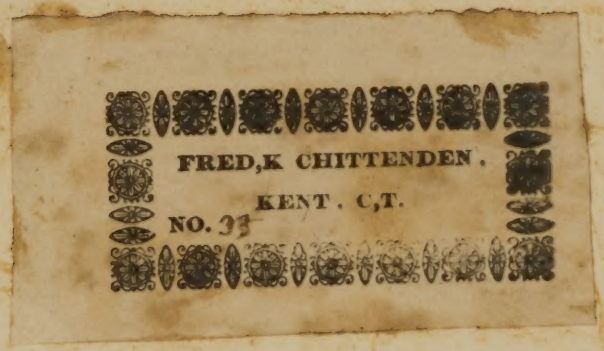

Charles B. Andrews

May 12th 1866

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Presented to Charles B Andrews
by
Fredk Chittenden
May 12th 1866

Lectures

ON

LAW.

By the

Hon. Ezra Fields.

VOL. 1.

1824

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Husband & Wife

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The contract of marriage is regarded both by the Com. Law. and the laws of this country as a civil contract. 1 Bl. 443.

The great result of this contract is that for most purposes they are regarded as one person in Law. 1 Bl. 422. And some of the books say that then the civil existence of the wife is merged in that of her husband, and that she has no will of her own. But there is no reason of reckoning to all this

The legal effects of the marriage contract (as it respects the rights) as it extends the rights of the husband to the wifes Property,

The principal by which the law is guided in this particular is founded on the duty of the husband to maintain & provide for his wife and her estate becomes his so far only as is necessary to enable him to discharge this duty.

This right of the husband to the property of the wife varies according to the different classes of property which she may have, to understand this then we must first treat in full of the different kinds of property and first of the

Personal Property.

All her personal property in possession become the absolute property of the husband on the marriage & this then is an exception of her paraphernalia 2 Bl. 435.

Personal chattels include money and all moveables it includes all personal property except of the term and of them he has the absolute disposal, either by gift sale or will, Co Lit 351. 1 Bac Ed. Bal. & Fem.

Hence it follows that if the husband dies, the wife surviving him, this property goes to the representatives of the husband, and not to the wife if he bequeaths it, it will go to the legatees, if he dies intestate it will go to those entitled to his property under the Statute of distributions Co Lit 351. Bac. Abd. E. 3.

But the husband has no absolute interest in the property which the wife holds for another use. Where property which she has as executrix is vested in the husband he has a right to that property the husband will have the entire control and may dispose of it that he holds it subject to account to the legatees &c and if a man marries a woman who is an Ex.x or Adm.x in by the marriage jure uxoris assumes the Ex.x or Adm.ship and must discharge the duty in the manner as her wife would have done, had the remained sole. Co Lit 351. Bac Abd. E. 3.

The husband is also entitled to the personal chattels accruing to the wife during cov. so that if during this period a legacy is bequeathed to the wife or the husband under the Statute of distributions her legacy or portion is the husband's Salk 115 Bac Abd. A.

The husband is entitled to the arrears of his wife's labour in the same manner and right that he is entitled to the wages of his own, Salk 114. Esp Dig 127. 1 Bac Ab - H. 2. E.

Such property above enumerated is of a moveable

nature and is given to the Husd. for another reason viz, it is the policy of the Law for the husd is entrusted with all like authority interests between Husd & Wife.

Personal Property or things in action called Choses in Action

By a "Chose in action" is meant some debt or duty which one has a right to demand and recover and in this place is one which the wife before cov. had a right to demand &c. Choses are bonds, Notes, debts &c. Over this species of property the Husd has during Cov. absolute power to make the Choses his own, i.e. to reduce them to possession. but they are not his absolutely by operation of marriage as is the wife's personal property in possession. Stra 516. 3 Atk 55. Bac. Abd. E. 3. Co Lit 351.

To render her Choses entirely his he must reduce them to possession or do something equivalent to it during their joint lives and if within this period he does not reduce them to possession either actually or virtually they will on his death survive to his wife and if the husd die before the Husd and the Choses should remain undisposed to hers, by the C Law they would go to her representatives. But by the Stat of Distribution it is said from this decision and given to the Husd. 1 Atk 515. Pu. Chan 209, Com Dig E. 3. 2 Atk 435.

It is said that if the Husd dies during the life of the wife that the relation ceases and if the husd dies first the consequence is the same. and that her Choses are his absolutely. By virtue of the Law and by Mod. decision. this is doubted. 4 Atk 434-5.

It will be doubtful this we must look in mind that old Law that if the wife survived the chattels vested to husband survived to her. But if the husband survived, the wife the chattels not vested to husband during cov. did not go to the husband but with husband's representatives. But then by Stat 29th C. c. 2. they are given to the husband and by virtue of this Stat he can retain them as all claiming as representatives to the wife and this is brought about in this manner by 31 Ed 3. The admin of the effects was given to the next most unique friends and by construction the husband is accounted next friend to her by this Stat. he is entitled to the admin of all her chattels after her death. 1 Roll Rep. 921-4. Salk 36. 1 P Wms 444. but by Stat 29th Ch. 2d the admin is not made liable to account with the representatives of the wife, so that in reality he is entitled to the chattels. 3 Bl. R. 515. 4 Co. 373. 3 Bac. Ab. 4 Ed. 3.

According to the best opinions the Court as I have laid it down. But in this point there is a great contrariety of opinions for and against the rule. From against this rule entitled that husband right to administer is founded on principles of the Common Law, independent of that provision. But let the question be as it will, the result is the same. 4 Co 51. Com Dig Adm. B. 6. 3 Ke. R. 346.

But the husband cannot dispose of the chattels by bequest of the surviving him. for it will be evident that he had power to release them to hus. during Cov. but if he disposes of them by will they are not released to hus. which being for the will is consummated only by his death. Co Lit 351. 1 Bac. Ab. Ex. C.

But in Eq. the husband holds the chattels of the wife subject to all her creditors for debts which she contracted before cov. I say before cov. for debts contracted after cov.

are void i.e. they do not bind and in gen. not the hus.d Co. Li. 351.

In this case we have no such exemption in favour of the hus.d as administrator for the Stat. 29. Car 2.d is not here even prima facie evidence of law.

Obj.n If the hus.d neglects to take out adm.n and another administers it is decided that the hus.d is entitled to the personalty as next of kin, but holds it subject to her debts. 3 Atk 256. 1 Ves 168. 10 Mod 381. Toller 373. This a rule of which the ancient law-men dreamt and on what principle this mod. rule is founded I am not able to divine. He cannot be made next of kin by any table of consanguinity. This rule goes further than the Stat. 29. Car 2.d for that gives the chattels to the hus.d as adm.r but this rule disposes into his adm.ra pers. This is one of those few rules under this title that evidently shew that the disposition of the property of women was made by men and by themselves. This rule was always repute in this state. This is the rule which supposes that the relations do not cease by the death of the hus.d and the rule affords this consequence that the right of kin or next of kin to her personalty descend to his heirs & that the heirs of the hus.d are heirs to the wif. and present to her own by consanguinity 2 Atk 256. 10 Mod 381.

If the rule is questionable a fortiori the consequence it is. But this is not law here.

I have thus far treated of chattels as if there was no purchase of them by the hus.d

Purchase by Settlement When the hus.d has made a settlement on the wif. the chattels are his immediately, for the settlt is an absolute purchase of the chattels in action and if he dies they will go to his representatives,

This jointure operates from the time of the marriage. The whole in the chose is vested in him at the time of the marriage. Roe 63. 312, 412, 2 Ver. 501.

This operates only when the wife survives the husband for if he survives they are his by survivorship. But among the modern Chancery the rule does not hold unless there is an express or implied agreement to that effect. If there was an express agreement, or if the settlement was in consideration of her choses, there would be no doubt of this being the husband. Ante 682. 3 P. Wms. 199. n. Ro. Ch. 209. 2 Ver. 64. This rule you will observe is not without qualification — If the settlement was made after marriage and expressly agreed to be in consideration of the choses, yet they will not deem it a purchase unless in the opinion of the Ct. it appears to be an adequate satisfaction or equivalent for them, and the Ct. will in their decision decide what proportion of the choses, which the settlement should be considered as a purchase. 2 Atk. 448. Roll. on fraudulent Conveyances. 285. n.

The reason of this rule respecting purchases of choses by settlement after marriage is that the wife is deemed to be the wife power of the husband is presumed to be under her control, and when he agrees in equity cannot be binding and that Court will set her free from it if it is improvidently or unwarrantably

Arrears of Rent, due the hus. before the husband by virtue of Stat. 32 Hen. 8. but he could not from it otherwise unless he reduced it to possession for it is a chose in action, 2 Atk. 434. 5 2. Ver. 7. 4 Co. 51. a. Co. Lit. 162. a. 357. a.

If a debtor of the hus. is sued by husband & wife and a joint judgt is obtained the wife has no longer her original exclusive right but it is destroyed by the judgt and the wife

holds jointly with his husb. and they are joint tenants as to his priv. and on the death of one, the survivor of them collects goes to the survivor by "jus accrescendi" and it is in this particular they resemble joint tenants, 1 Ld Ray 179. 3 Ath 189. 1 Ver. 396.

In Equity it is decided that on the death of the wife thus circumstanced the priv. accrues to her heirs and assigns, not to the husb. But tho the "jus accrescendi" is unknown in our Courts yet I cannot see why it would not go to the husb.

The husb. can assign her choses. but he must do so on a valuable consideration for if he assigns them without value the may claim them in his death 2 Atk 208. 420. 3 P Wms 199. 1 Br Ch. 44. 1 Eq. Ab. 308.

That we may understand this rule let us consider that a chose in action is not assignable at Law, but in Equity they are, if the asst is for value it is equitable and claims will not prevent its due assignee effect. But if the asst is not for value Eq will not assist and it cannot be enforced by law which knows no asst of a chose in action.

It has been said that a voluntary asst by the husb. tho void as to transfers the interest, yet it will have the effect to change the property, and the assignee but this wholly undoes the contract this is not law tho it is asserted, 2 Atk 208. 1 Br Ch 44. Rel. Fe. 245. To the old opinion 1 P Wms 380.

But the husband may release without value and no court can set it aside, it will be void. 2 Atk 208. 1 Eq Ab 308. The reason of this is that a release is an instrument good at law and binding, and it Equity has no jurisdiction from this tho's a voluntary release is not a voluntary

conveyance is not good.

When the heir is obliged to resort to a Court of Chancery Bastard his left choose an action the Court will not, the Ct. will not decree or rent but upon the condition of his making such a compensation to his lifs as shall appear equitable to the Court, as if he petitioned for the Master to convey & give up to him what choose the Ct. do think fit for the lifs. 1 P. Wms. 282, 251, 458 4 Bx Ch 326. Cas. Ch. 280-8, 3 Ver. Ch. R. 506.

I will shew in bringing that this case of the Ctes. Bay is one, and parallel to all the reasons of the wife & the rents & Counsel.

Secd. If the Ctes. a right for value the reversion is built & by 3. to make a reasonable provision in the life of the reversioner for if the Ref. appear the reversion the reversion must devolve to Equity, to compel it, but which begin that Estate he will be subject to the same terms, and is in the same situation as the heir and have been the subject petition for the same. Ch. Cas. 351. Prec. Ch. 6. 3.

Neither can the lifs choose in order to take in Execution for the heir's debts during the life for they are not his under reversion in fee. But the conclusion reason for is that a choose in Ct. is never liable to be taken in Execution.

The goods of a person lying in the hands of a bailee or in the hands of a finder, in the marriage not in the hands the same or if they Ctes. been in the actual poss. at the marriage and they are in the hands of a third person, yet when they Estate they are by construction accounted to be in the poss. of the lif. But the Court takes for granted that the bailee or finder has not converted them, for in that case the lif's petition is

tured with a right in action for damages and this right is a chose. 1 Rob. 641. 1 Vent. 261. Bac. Ab. H.&W. 1 Ld. 172, 4 Co. 489.

If goods are thus settled on marriage and they are converted after marriage it has been a question whether the husband could recover in his own name or whether the wife must be joined. Ld Raymond pronounced his opinion that the wife must be joined. But I can clearly see that there is no necessity of joining her, for the rule of the Courts is by constituting that of the plaintiff role on marriage and after marriage the property of the wife is that of her husband if there is a subsequent conversion entitling the husband alone can recover 3 Co. 631, 1 Rent. 1 Ld.

If a third person is bound by contract to the husband to pay to the wife a sum of money the husband has the entire control of it, and he alone can claim it. It is in his power to discharge it, surrender it &c. all the right the wife has is to receive payment and her receipt for it is good defence in a Court of law on the contract, and it must be, for a payment to the wife, is a Court's performance of the Contract. 3 Rent. 351.

Husbands rights to Chattels real of the wife

Chattels real are such as savour of the realty, as mortgages, terms for years. &c. Over this kind of interest the husband has a more extensive power than over choses. The reason of this is, they both are legal interest, yet but one is absolute at law, viz. Chattels real, and as this interest is defeasable at law. so also it can be recovered by process of law. hence Chattels real are liable for husband's debts, during Cov. 4 Co. 638-9. 1 Role 344. Co Lit. 46, 351.

The husb. at all times during coverture has the absolute right to dispose of the wife's chattels real but if he does not dispose of them, in the death of one they survive to the survivor, and in this respect they are quasi joint tenants of the chattels real. But in all respects they are not tenants for if the husb. during cov. could dispose of but his undivided moiety to Lit. 351 Co. 516, they are tenants in regards their jus accrescendi and no further.

2 In the 2d. Reg. 338. This doctrine is rejected, but it is a departure from the Com. Law rule.

The husb. may dispose of chattels real of his wife, but it will be void in equity unless it is not for a valuable consideration. When they talk in equity of a mere gift the husb. can make a conveyance to them real, i.e. matters leaning in favour of a valuable consideration, valid at law, and if being void at law equity does not prevail to give it effect. 1 Ves. 48, 3 P. Wms. 39, 2 Ver. 276, Cas. 40, 279 301.

Neither husb. nor wife can dispose of the chattels real for they are quasi joint tenants, but the jus accrescendi in a mere fact after the death of the survivor, that is, the death that constitutes the right of survivorship. 1 Ves. 276, 2 Eq. Ab. 454, 1 Bac. Ab. 3d. H. 6. 2. Co. Lit. 351. a. 1 Ves. Ch. 418.

But the husb. may by an act executed during cov. as by deed of Assignt. make a transfer of the chattels real to vest even after his death, Cro. E. 287, 1 Roll. 344. The lemma of this is that here the intent ment is intent when the instrument is executed, its vesting in property only then is contemplated.

When the leg. survivor takes husb. the chattles real are not liable for his debts Lit. Rep. 286. Co. Lit. 351 1 Roll. 349. In the case of mere joint tenancy, and C. conveyed

if the Wife dies first, the Husd. does not hold the Chattles real liable to her Creditors, but this, in this State is not law, the fee accrued is not administrable, is used,

If a Feme Sole is a joint-tenant, with B. and she marries C. and dies B has the whole by survivorship to the exclusion of the Husd. but during Cov. it is in the power of the Husd to prevent this. 2d Lev 418. Bac. Ab. Jt. & 2, Co. 185.

Husbands interest in the Wifes freehold

If the Wife really Husd. has the sole use-fruit during cov. but he cannot by his sole act alien it, nor make any disposition of it for a longer term of time than for his own life at the most, and in this case may be no longer than during cov. 10 Co 142, Bac. Ab Jt. C.1 Mole 347.

The reason of this is obvious for the only reason of the Husd. having any part of the Wife's subject was founded on the necessity the Husd. was under of supporting his Wife and it is reasonable that he should have enough of the Wifes property to remunerate him, but if he makes a disposition of her property, that must continue after he is relieved from supporting her. this reason ceases to exist and as he has no other ground on which to erect any claim, tho he may attempt and a convey, yet he cannot substantiate it.

Neither can the Husd & wife convey a alien in fee by a joint-deed, the only way in which this can be disposed of is by "fine and common recovery" & By this the is estopped by the deed, the & her representatives, from blending her covertures, &c. &c. Co. 670, Bac Ab. Jt. 8

In this case of the husband the real estate of the wife cannot be conveyed by the joint deed of Husband & Wife, in the State to have the assent satisfied it. But it has become law for long usage and to have a Stat. that cannot when this as a legal right.

By Stat 22 Hen. 8. the husband & wife are entitled to mutual courses for their lives a twenty one years and they are entitled the either or both should die, upon the expiration of the term.

An Average estate for life is estimated in seven years this is uniform designating the particular life which the estate shall run, but in the aggregate it is considered as a medium for seven years 2 Fund 180, n.g. Bac Ab 343, 5 Co 9 Rich 378.

If however the husband assumes the grant of an estate which he is not entitled to, he does not forfeit his estate in actions & other damages for tort &c, but his grant will endure for the grant of his own life if he has the courtesy if not, for the joint life of Husband & Wife. &c. A grant in fee, his proper real estate this grant will come to the grantee as a grant, not an estate, as the husband could have done anyone had he not abused it, 2d Sec. 1151, 5 Co 94, 9 Co 140. Co Lit. 326. Bac Ab J. J. There is no reason assigned in the Books for this rule, but it seems apparent that this should be the consequence. If the husband by act of grant his estate there surely is no one but his wife to take advantage of his acts. But this doctrine is discarded because this right, But when her capable of taking advantage of his acts and the estate was devested absolutely in her now the reversion in her upon death revests it, in heir,

If the husband assumes the husband she has exercised her real estate in the same manner in which the had it before the marriage and on her death it will descend to her heirs,

The Wife cannot during the life of her Husb. devise her real property but it will descend to her heirs

If the Husb. has issue by his Wife capable of inheriting her estate he will have the estate during his own life and this is called his "Courtesy" he has it in lieu of the Wife's dower which was chiefly dependent on his Land inherit. Co Lit 30. Lit Sec 35. 52. 2 Bl Ch. 126.

The Husb. is entitled to the courtesy in the equity of redemption in a mortgage in fee provided he has a legal to courtesy at all. Pow. M. 112, 115, 1 Ch Ca 663.

There are many rules relating to courtesy by the courtesy which I have treated and explained fully under the "Estate for life"

By the birth of infant issue the Husb. right to the Courtesy is initiate and is consummated by the death of the Wife provided he survives. Co Lit 30, 2 Ch. 28.

Rent accrue during life, from the life's real or other property belongs, respon Co Lit 351. a. Ambl 692, 4 Co 51. 1 Mall 350.

At C. Law the Wife can have no sole and separate property i.e. she can have no property over which the Husb. cannot have some control, Pow. C 103, 1 Ambly 94-5, 1 Ch Ca 270.

But at this day a Gift to the Wife to her sole use and separate use will be upheld in Chy against all claims of the Husb. and the Chy treat the Husb. as the first property an entire stranger 2 Ves 191. 665, 2 P Wms 316. 79. 1 Pow Con. 444. 1 Ch Ca 270.

But this is a modern rule of Chy for ancients the Husb. would not have been excluded from the power to controll.

Neither in first property has the Husb. his Courtesy The right must it is as absolute as if a Feme sole, except that the Husb. dis, bar of it by deed and from this she is barred by express Stat, 32 Hen 8, as explained by 34 Hen 8. Yet without barring the Husb. dower directly yet she can indirectly as will be explained, 1 Pow C 444, 2 Ch. 675. 1 Ambly 97. 98. 102-3. 3 Ch Ca 393. 1 id 270. 1 Vern 2 Ch Ca 14. 663. 3 P Wms 337.

The husband cannot by his express deed or gift to the wife, make her sole and separate use, for he has no power over it after it is vested in the wife, but he may defeat a jointure made by the wife, to her sole and separate use. 1 Lit. 3a, 356.6. 2 Bl. 292-3.

Neither can he defeat a devise to his wife to her sole and separate use, for it is cast upon me by operation of law, without the assistance of the testator.

It has been said that if a stranger will provide a trust term to her separate use, nevertheless, that her interests vests in the husband by the act of marriage. If this is law, I confess that I am totally unable to discover a reason for it. The rule is predicated on its being a "trust" term but why any more than the sole dis posal of the mere term should be in his own right, and why shall the trust term be thus forced by the act of marriage while the terms which the holder in her own right the husband possess (exclusively as his own, until he has disposed of them, by changing the property. 1 Ch. Ca 271. 2 Ch 421. 1 Vent 98. If this is a rule of law it is an anomaly, but it has since been denied and I presume is no longer regarded as law. 2 Bl Ch 395. 10 Lit. 3. a. d. 1.

Of the wife's claim on her husband's Estate

And 1st. Of his personal Property, under the Statute of distributions of 29 Car 2d. She is entitled to one third of the husbands personal property, the debts being first paid therefrom, provided he dies leaving issue. But if he leaves no issue at his death the widow is entitled to half of his personals the debts being as in the other case paid first therefrom. 2 Bl. 515.

Thus the wife derives all her rights to the personal property at his death what he leaves, except her claims of paraphernalia, from the State Law.

To express the rule as laid down by Fond. more correctly I will give it in his own words. The Stat. 29. Car. 2. enacts to this effect that if the husb. dies intestate, leaves issue the widow is entitled to 1/3 thereof and if he leaves no issue to one half of the personal property the debts being first paid, throughout.

The Wife's Claim on the Realty,

The wife is entitled to a life estate in one third of all the inheritable estate which her husb. might have had during cov. and which any issue that the might have had by him could have inherited, Litt. s. 36. 2 Bla. 129. 131.

All the States of distribution of Your States are similar to 29. Car 2d.

The husb. by no possible means could bar his wife of this right called the "Right of dower" But the may bar herself by joining herself in making a fraudulent conveyance, 10 Co 49. Plow 515. 2 Bro 139.

The the husb. cannot bar her by his own act yet there are cases where the husb. had concealed and deceived his wife to join him in a conveyance. That Ch. Eq. compelled him to perform this Cov. 3 D. 11 Ves 189. 1 Ves 495 Ver Ch 76 3 Atk 189. 5 Ha 446. Bro 505. 514

In N York it has the wife can bar her right by joining in the deed of conveyance with her husb. In this State the rule is that the husb. can bar her by his sole & separate act,

When she cannot be bound the rule is that the wife have

(Dower)

dower in any part or all of the realty which the fee the wife have had could have inherited. But it makes no difference whether the estate had fee or not. But if the fee which the wife by possibility could have had could not have inherited then the has no right to dower. (There is an analogy between her right to dower and the husd right to courtesy) 6 P. the estate is limited to A and the heirs of the body of his body B. now on the death of A. the wife have her dower in land B died without issue. B. died. B could have no dower for no issue could he could have by A. could have inherited the estate tail 53. 2 Blk 131 & 13.

I have treated of the various ways in which a life could be entitled of her dower under Jt. Estate for life.

It was once held that the wife of an idiot was entitled to dower but it was always settled at law that the wife of an idiot was not entitled to courtesy and it is now held that the wife of an idiot is not entitled to dower, Co Lit 31-2. Blk 130. 1 Lev 41. Bul 136. Esp Dig 125.

The wife's right of dower is paramount to the rights of a devisee a creditor and even of a mortgagee when the mortgage is made after marriage, giving to the rights of the mortgagee accrued at the time of the marriage where the rights of the lt accrued at the moment of marriage of course it is then paramount, 2 Blk 492. Co Lit 31.35. 4 Co 64,66. 10 do 44 a 49.

But to the Personalty the right is postponed to that of Creds. a legatee the Cred. may take the whole for debts except her paraphernalia, so may the husd. in the same extent, for the has no right to the personals except by Stat and the quia has only her portion.

of their personalty of which he dies intestate the is expressly postponed in favour of Creditors by the express terms of the Stat. and in the most tolerant it can be after the satisfaction of Creditors and a part of which he hud dies intestate (Lennard Collins) hence it follows that the rule not only applies in favour of Creditors but also of devisees.

In this State the Widow is entitled to dower in her hus.d intestate estate of which he dies seized a moiety to commencement of what he dies the owner of. for by construction he who has the ownership has the poss. in this County (unless my dr neither I have heard Judge Gould say in some recent cases) As she is entitled to dower of what he dies seized it follows that the hus.d can by his act bar her right by alienation.

We have a further provision by Stat that if a woman dies intestate after leaving a widow unable to support herself and there being no relatives bound by law to support her. that her property in the hands of the hus.d a devisee or both shall be liable to the charge of her support during her widowhood.

By the Eng Law. the Wif is not entitled to dower of her hus.d Equity of Redemptn in a mortgage in fee and yet in a proper case the hus.d is entitled to enter in the Wif Eqty of Redemptn (Cox Ca. 21. 3 P Wms 229. 2 Atk 128. 2 Ch R 516. 1 Br Ch 326.

In Con. & N York it is settled that the Wif is entitled to her dower of the Eqty of Redemptn of a mortgage in fee. if he died hus.d 1 Cow R 557. 6 John R. 240. 7 id 278.

How dower may be barred

1st. By a devise "a vinculo matrimonii" for in such case the hus.d when he dies does not die her husband. for

after given divorce he ceases to be her husb. in law. But the wife is entitled to dower on the death of her husb. and must prove

2 dly 3rd By her adultery dissolved this by the Ecc. Mastr. &c.

3 dly 3rd By her husb. committing the crime of "high treason" rather "treason" forfeiting the use land by the felony of the husb. but this rule of law is repealed: For in consequence of an attainder which follows the crime of treason, he first commits it and he commits treason cannot in an action which he first commit without to see 32 2 Blk Com. 250 pp 276 & Co 17

4th To also the wife may be barred of her dower by conveying the title deeds for the time being or land and if the deed plead that she has them not, (when the husb. takes them &c) it would be her proper of dower, 4 Co to 17-18.

By the Constn of the U.S. of America, no attainder of treason shall work a forfeiture of the criminal's property beyond his own life. Therefore in this Country the wife dower is not forfeited by the treason of her husb. Constitution U.S. Art. 3 Sec. 3.

5th The wife may forfeit her dower by accepting it free, or by accepting an estate greater than her own

This is said to be founded on the Statute of Gloucester But I can see no reason of mentioning to that Statute, for it is apparent that such must be the consequence of the law. 2 Blk 136-7 8. 2 Roll 140.

In the case of bar of dower by divorce, in this State the rule is different, for a divorce "a vinculo matrimonii" or barring her of dower depends on the party being the guilty party, Stats Conn. Dower Act

Then are all the rights the wife has to the estate of her deceased husb. except that called her "Paraphernalia"

Paraphernalia

To this she is entitled separate from the share of Distribution. It comes of three separate classes of articles viz. Bedding, Apparel, & Ornaments or other articles are comprehended within the description Code Ch. 229.

It is sometimes difficult to distinguish between her paraphernalia and Property to her sole and separate use. The distinction is important since to the former her right is qualified but to the latter it is absolute that she holds to the utter exclusion of her husband his heirs devisees Ex'rs and Administrators

Property to her sole and separate use to vest exclusively in her must be given "to her sole and separate use" it is not necessary that these precise words should be used. For it is always enough that the intention of the donor is expressed and clear to this effect, but when the intent is in doubt Chancery will not decree it as meant i.e. to her sole and separate use 3 Atk. 398.

The most effectual and safe way is to use the words abovementioned, but they are not being always necessary even so much so that if the intent that the expressed be to her sole and separate use, can be directly inferred from the nature of the property and the circumstances under which the gift was made E.G. Plate and Ornament were given to the bride on her marriage by her father in law, but without any express declaration that they are to her sole and separate use yet the Chancellor must infer from the circumstances under which the gift was made, as also a gift by a stranger under such circumstances

Ornaments given to the wife by the husband have been held in some cases to be to her sole and separate

are even to the exclusion of Creditors. But there cases depend upon the particular circumstances attending the Gift, when there are no words expressly to the purpose. 2 Atk 293. 1 Ford 393.

But when the Husd bequeaths personal chattels to the wife the Law, no other claim to them, the Court be regard as holding them, to her sole disposal are, for he takes them in, the character of a legatee which presumptuous the Husd to have been the owner of them at the time of his death, hence it is clear that the cannot hold to the exclusion of Creditors (in ancl)

Property given by the Husd to the wife in his life time to be worn as ornaments are not an absolute property in the wife absolute use as if he gives her a gold watch or a diamond, they are liable in the last instance for the payment of debts of his. 3 Atk 394

Paraphernalia is property of two kinds 1st apparel & bedding 2nd ornaments. It is material to keep this distinction for the wife claim to former is more absolute than to the latter Lon. Deg Bt & J 3. 2 Bl. R. 435-6. 1 Roll 911. During the Husd life the second class are at his disposal, but according to modern authorities he cannot bequeath them or in other words, the claim of his wife on his death are paramount to those of the devisee. 2 Atk 77. 3 id 358. 3 95. 2 Blk. 436. 1 Ves. 730.

The 1st class may be taken on Exn among the Husd life by his creditors (in ancl)

But the 2nd class cannot be taken in execution, nor can he sell them. But I conclude, that this class are meant, that when the Husd has extravagently

supplies his wife with bedding, apparel that he cannot dispose of a part, for this would be a prefer on creditors and would be an extravagant rule.

But he cannot sell all, and when the hus. dies disposes of all the wife's paraphernalia, of the first class, he will hold at C. Law, quite of a misdemeanor in Park. I. 501, 2 Bl. 436, Com. Dig. Bd. G. 3. 1 Roll 911.

We have a Stat. that to provides for the wife, that I conclude it supersedes the com. Law in the case, The wife's claims to the 2d class hold against those claiming under the Stat. of distributions, but the court will to creditors who in the last instance may take them 2 Atk 104, 3 Ed 369-95, 1 P. Wms 730

And if the Phecuniary creditors who own the realty in the hands of the hus. takes the 2d class of the wife's paraphernalia she is entitled to a claim on the real estate "pro tanto" in the is regarded as a creditor and stands in the same relation, her tanto, to the real estate as the phecuniary creditors do so that her right to the second class, is not only preferred to legatees, and simple contract creditors but also to the heirs of the heir at law, to the inheritance 1 P. Wms 730. 2 Atk. 77. 104. Fol. Eq. 1. 422, 3 Atk 369, 393.

But if her husband should be taken by a simple contract creditor she would not have a claim on the assets in the hands of the heirs, for the most she can do is to enter into the same relations to the estate of her deceased hus. in which most creditors stand. But a simple contract creditor has limited an lien on the realty and the widow can have no more. 2 Atk 104-5.

But when the hus. has created a trust estate for the payment of debts, in case with them which an

you can show what are trusts, if a Simple Creditor takes the bf. paraphernalia, they may come up on the trust estate, with a claim "pro tanto" for the trust is under the cognizance of Chancery and in that Ct. there is no Priority in Creditors 2 Atk 105, Fib 348, 436.

A Settlement a Feme sole makes in the bf. before marriage, mentioning expressly to be in bar of all her claims upon the husd. estate. Bars her also of her paraphernalia of the 2d class, for the settlement is accepted to be a purchase of that also, and the rule is the same if the settlement was made after marriage but in pursuance to articles entered into to that effect, for in such a case the settlement when executed has relation to the time in which the articles of such settlement were entered into & then the settlement is regarded as having been made when the bf was first sole, 2 Ver 49, 83

When the Testrix creditor comes in Paraph: of the 2d class, it is said that they may come to the Realty in the hands of the devisee, as if the estate was in the hands of the heir at Law, but on this question there are different opinions and it may be regarded as a question yet to be

It would seem that the better decisions are against but I do not see why they should not resort to the Realty in the one case as in the other, for they are equally volunteers 3 Atk 395, 1 P Wms 730, Toller 221, 423, 3 P Wms 544. n.1. Amb 6. 3 Atk 438, 2 Ver 7.

If the Pers. Assets the 2d class on his death the Widow has the Legal and are the Ex a debt. towards them, and if there is a surplus over of personal property, after the Legat. of debts, she is entitled, to such a part of it as is mar. way to.

redeem the pledge Paraphernalia and thus claim the Rules to the exclusion of legatees for the is regaeter" provided a Creditor 3 Atk 395.

But the hsf. claim to the second class, when a distribution is made of it by the hus. is personal and does not descend to his representatives, e.g. the hus. bequeaths to B the 2 class and dies the widow does not choose to claim it from B. nor on her death her representatives cannot claim it from B. 1 Ves 246-7. 1 Rolle 911. Cis Cas 243-6.

In this and most of the states all creditors are regarded alike and all have equal claims on all and any part of the 2nd real & personal estate & thus here if the simple creditor should take the 2d class the wife would be a creditor to the estate and hold as the heir as much as if the specialty creditor had taken them. This point has not been decided in this country but it must be taken as settled.

Husbands liability on account of his Wife.

His liability continues to three functions,
1st For her debts. 2d The costs. 3d In some cases, on her crimes.

1st Hus. & Wife are joint & sole for debts contracted by the wife when sole. But on her death his liability ceases unless judgt has been obtained against both before her death, the reason is that his liability arose from the marriage relations & when this relation ceases his liability ceases also, 1 Eq. Cas 60. 1 Rolle. 351. Bac Dig 122. Cath 80. 3 Mod 186. the reason why the judgt is not can bind the hus. is that the judgt alters the debt, and converts the original duty of the wife into a joint duty of both, & cures his liability continues the his wife. ceases by her death, is most,

Hence it follows that if the wife dies then being no issue, and no other, then the creditors of the husband have the debt provided the issues so exists, for it the issue upset her representatives are liable the then amount. 2 P Wms 409. Co Lit. 351. Eq Ca Abr 448, note. 1 P Wms 464.

If the husband dies first she is liable as aforesaid when sole, and the representatives of the husband is not liable at all. Eq. Ca Abr 122. 3 P Wms 409. 2 Ch. 347-50.

I take the principle, husband's liability is the effect of the life or marriage extends all her property of one class and is totally vested all marital control & disposition of all the rest, and is not entitled to the money of her own labour, and also in case of husband's the is provided from arrest, it would be unreasonable to hold her liable under all these circumstances without her husband when her husband has the whole income to discharge them. 1 Ch. 436. 3 Atk 256. 1 Roll 352.

Hence as mere trustee the [illegible] may be taken and held in a civil action and if she is so taken the must be discharged on common bail, and that the Ca ad qu do in matter. 1 Ch. 486. 149. 3 ed 124. in Deg. 117. 9.

But when the action was commenced when she was sole, she is not discharged from her sole liability by a subsequent marriage pending the action but she will be regarded in every respect as a feme sole. Cro Car 323. Cth Deg 328. 4 Bl Ch 414. 1 Ala N.S. 314. The reason is that the was originally liable in the first place, and the plaintiff obtained a lien on her property for his debt and now it is impossible in her to divest herself by her own act. The Bill then be after attaching needed & Judgt may have a sci facias against both, and stating the fact of marriage obtain Ca a ca. Ch. and others enforce his remedy. Cro Ch 30. 1 Ch Ca R 315. Salw 172.

If husb. and wife are taken on mesne process for debts or tort the h. must be discharged on common bail but that not if bail for debt or remain in custody. The wife is excepted because it is supposed that the owner receives bail for in paying bail bind family to his bals free indemnity but a wife cannot find herself. 2 Blk R 720. 1 Lev 216. Stra 1272. Ball to the contrary. 1 Vent. 179. a 79. not law.

The h. is gen. when taken on mesne process is released on bottom but this rule is not universal. For if the mesne wife is not notorious the rule remains in custody unless the case bind which in respect, the action, and rule lies can be obtained a discharge on motion if the injured on the P.ff by pretending to be feme sole, the application to the Ct. to do on motion what can be merely by a appeal to their discretion, 2 Blk. 720. 903.

If she is arrested on mesne process for debt or tort but being an alien without the leave of process the cannot be discharged on motion but must plead. 2. Mod. 280. 1. Ld. Ld. P. 233. Salk 646. The reason is that the husb. cannot be sued to quit bail for her.

It is material to observe that in all the cases in which she is entitled to be discharged on motion is when is attach on mesne process. But if she is arrested on final process she cannot be discharged unless it appears that her sole actual w. was occasioned by the contrivance of the husb & her creditors Stra 1237. 1107. a 1167. 2 Blk. 720. 3 Wils 124. Cap Dig 327. There is an opinion in Lev 51. against it but it is not law. The reason of this distinction between her being taken on mesne & final process is that in the former the only object is to obtain bail and is not

intended as coercive means to obtain satisfaction for the debt, a tort. But in final process debt is out of the question the only object of an attach on this is to obtain judgmt. and as the debt is disjoined here she is liable for it & the Pltff is entitled to all his lawful means to obtain it. On the death of her husd. she is solely liable & then there is no reason or her being injured.

Thirdly. The husd. is jointly liable for her torts committed before marriage. and also those committed during coverture, if the dam then results his direct in the 1237. Co Lit. 301. 376. 1 Rol 149.

And tho the tort both (as in fact and judgt. of law) is the only guilty party. they are jointly liable & the reason is that the cannot be sued alone.

But if the commits the tort several Civ. by the husd command even tho in his absence, as joining with him a dom in his company she is only liable. In all these cases the tort is treated as his sole act for the wife is deemed to act by his coercion.

Neither can he relieve this presumption by pleading that in point of fact he endeavored to restrain her for it is taken for granted in the law, that it is the husds power to restrain the wife from such acts. 4 B.N. 28. 1 Hawks 3.4. 1 Roll 348. Co Cas. 184 or 254. 355 or 481. Whenever they are jointly liable for her torts if the husd. dies the is solely liable for in all such cases she is deemed the guilty party and the only reason of joining the husd. is because the cannot be sued alone during his life Par v Par. 313. Co Cas 366. 519.

But on the other hand when they are joint

-ly liable for her torts if he survives her, his liability ceases only, judgt has been had during coverture, Co L 374.

Yet if he is solely liable during coverture his liability survives against him on the death of the wife. There has no ment point been determined but the rule must be correct on principle for the act is clearly his and if so how can it be affected by the death of his wife.

Thirdly In some cases he is liable "immediately" if the wife commits larceny or burglary these two, his coercion jointly with him, or in his company, he is solely liable 1 Hale Pla Cr. 65, 1 Hawk 4, 4 Blk 28.

The rule is the same as to the offence of burglary, this rule is not without opinions, but a respectable weight of authorities are in favor of it Kelyng 31, 4 Blk 28, 1 Hawk Pl. Cr. 45.

The principle of the husd's sole liability under this head is said to be founded on that coercion, under which the wife is supposed to act, when committing such offences under such circumstances but this I apprehend depends upon another reason which I will soon mention.

If the commits such offence without coercion from her hus^d she is alone liable and treated as a feme sole and even it is said if she aids it by his command but in his absence then she alone is liable and guilty as a feme sole. 1 Hawk 4, Kelyng. 31. 4 Blk 29. 1 Hale Pla Cr 65.

For mere misdemeanors committed jointly by them they are jointly liable - but merely she acts as mere under his coercion in this as in torts and minor crimes. This with other reasons leads me to apprehend that coercion is not the only reason. 1 Hawk 3-5, 10 Mod 89, 335. By mere misdemeanors

is merely an offence short of felony.

But for higher crimes as treason murder & killing* committed jointly by them, the wife not excused but both are liable. The reason why the wife not excused in the enormity of the crime & the law considers that it is impossible that the husband could have command and influence over her to compel her to commit such an high offence. 1 Hale P.C. 65. 1 Hawk 4. 4 Bl. Ch. 29.

The true reason of this distinction I take it is this. But I will premise that in a simple theft the husband is alone liable, the treason & the act is joint they are jointly liable. In both the wife is under the husband's coercion yet in the former alone she is excused. The true reason of this originated from the benefit of the clergy for a crime for which a woman would suffer capital punishment, i.e. the women were never admitted to clergy as in the case of theft, the husband on conviction could be admitted to clergy and by a reading or the thumb escape death.

But the wife, if she was a joint offender, was entitled when this merciful and constitutional exception, "it need" the pleas the pleas, the obvious distinction, that long before the first admitting women to the benefit of the clergy, the when the act was joint the wife was considered as wholly under the controle of the husband and in most cases extend the husband the only guilty party. But in the latter cases such as treason &c. there was no clergy for the husband of course he would suffer equally with the wife. So this case there is not there is an exception which characterises the former. of course the reason for a like construction does not exist, this is purely the reason of the distinction.

If a feme covert induces the penalty of a Mental State. the husband is bound to forgive it, in the it is merely coercion

and without his privity the rule is the same 1 Hawk. 5, 2 Bac 294.

In both the penalty is a debt and, as that alone must arise to recover indirectly is to declare it a debt.

Q. Q. The wife remains and refuse for her? after he has committed a felony she is executed and is not deem an accessory as any other person would have been considered. This is one of those cases in which the relation of husband & wife purge crimes, 1 Hale 44 4 Blk 38-9. 2 Hawk 451. 1 id 4.

In all cases of crimes to which the above exceptions do not extend she is held as a general rule. Hawk 4. 4. Co 72. Keling. 34. 3 Keb 34. Co Inc 482. Hob. 93.

How far the wife can bind the husband by her contracts, during coverture,

This power is said to be founded on the husd's express or implied Salk 118. 6 Mod 259. 1 Blk. 430. 1 Hawk P. 287. 296

It is difficult to reconcile this theory with the principles of law and its rules, since the husd is often bound when he has expressly declared to be held and clearly proves any one directing her. In fact he has repeated her assertions & the very hint in her contract for them his assent just without standing. 1 H Blk 348. 1 Blk 442. Bac Dig 122 Salk 118.

It is apparent then that his consent is not always necessary and it is also clear that his express dissent will not always exclude him. The main doctrine reason in it appears to me is, that as he is bound to provide her, her contracts for necessaries while she needs bind him. If he has not expressly for it, but even the law implies an assent and this legal institution cannot be altered.

"The necessaries which he is bound to provide are food, apparel, bedding, and medicine and they are to be suited to the rank in life to which those who are married were accustomed but being appointed 2 Lev 4. Esp Dig 122, 124. 1 P Wms 182.

There are four classes of cases in which the husband may be bound by his wife on the ground of agency

1st. Where he expressly assents to the purchase proposed

2d. Where he impliedly assents to the contract after it is made for an absent chattel is as binding as an (antecedent). Precedent 1 Bulk. 429. 1 Roll 350-1. Sid 120.

3d. Where the wife has frequently been in the habit of furnishing necessaries and the husband been in practice of paying them, i.e. contracts which the trader knows when from the practice of his he gives her public credit and it furnishes an implied assent to all under-sized contracts which the nature of the trade requires. 1 Bulk 431. 1 Sid 128

4th. When necessaries furnished by the wife come to the husband or his families use, then he is bound by his implied assent subsequent to the contract, and in the case of the third branch when the implied assent does precedent.

There four classes resolved in the four classes of agents which are 1st. Agent express precedent 2d. Agent express subsequent 3d. Agent implied precedent 4th Agent implied subsequent, 3 Burr 1333. 1 Sid 120.

In all these cases the husband is liable as the lawful agent of the husband and he attends in his service related to her country or master a principal quoad the acts of his servant or agent, for any other member of the family being already bound by his same way, if they act under the same circumstances 1 Sid 120, 126, 109. 1 Bulk 430. 1 Lech 116. Strong 214, or 1214.

General credit given by the husband or those of the third class cannot be defeated by any private prohibitions to act to defeat the interest creditors who may have on his general credit, for that a general credit cannot be withdrawn except by a notice as extensive as the credit given, for others interest creditors may be defrauded. 2 Kel 643. 1 Bl R 430. 1 Ves 95.

If the wife having no separate general credit pay for clothes and instead of allowing them, procure them the husband has first knowledge, he is not bound, unless she be bound. As he defrauds money delivered by her to procure them. But if the husband has knowledge when they are taken and then forbids them he ought to be liable for them he is presumed to know. 2 Ld Raym 1086. Salk 118. Esp Dig 123.

On the same principle if the husband forbids paying to procure them, the husband is not liable to the vendor. In this is implied no contract for anything not in fact contracted. The husband is never bound, unless he orders. Esp Dig 123. 1 P Wms 183. Rolle 350.

If the husband turns away his wife for any common cause, the incontinency is liable as all others for her necessaries, notwithstanding private prohibitions of credit general or special given from the husband, but Holt says that "the way are of turning her away gives her a (presumptive) public credit" 2 Lk. 606. 4 Burr 2178. 1 Bl R. 346. 1 Bos. & P. 139. 1 Term 375. 1 Bos & P. 339. 226.

If with the letter to stop when his wife to deprive her under such circumstances gives her a general credit, then will the incontinence of his wife barrowly to plead his obligation and his cruelty. Esp. Dig, 24.

But incontinence is a sufficient cause for turning her away and if he does so he is not liable for her support.

But the rule has this qualification, provided her name is publickly known, none doing this complaint. For else the wife the case it would be cruel, unless a contrary to plead it would be fair enough. B & P. 2 No. 1 Y.R. 603. 1 Salk. 6. 2 Ld. 270.

If a man cohabits with a woman not his wife he is liable for her expenses and bound by her contracts for them as if she were his wife "in fieri" and if he should die and on her contract by such wife de facto he cannot prove that they were never legally married. 1 Lev 41. Bul N.P. 136. Bac Ab. Ex. a. Salk. 27. Ld. Raym.

And the rule is carried further and is held that if the above two also join in an action as husband & wife to recover a debt due the wife the court will not plead unlawful marriage and the rule is carried still further that he may be prosecuted for her costs also that he may prosecute for costs to her. This last I mean cannot be relied. For merely it is plead to principles that he should exercise the marital right against third persons. Cro. 3, 473. Bac Ab. Ex. a.

In none of these cases is the plea of "no marriage" good but it is good in some cases as for the heir at law against the claim of dower. So also in an action by the husband for criminal con. with wife Deft. may defend by pleading under plea given "No marriage" 1 Lev 41. Bul N.P. 136. Bac Dig. 125.

If wife has all these powers provided her husband does not provide her "suitable and sufficient maintenance,

But if they separate & he provides for her a suitable and separate maintenance, she is not liable nor bound by her contracts after such notice & settlement is publickly known in the place where he lives it is not sufficient that it should be generally known or that every indi-

evidence in his mind should have actual separate existence. But it is enough, to make it probable known in his own mind, for it is there that the law supposes her to be obliged to resort to obtain credit on his account. 1 La Roy 446, 1006. Salk 116. Esp Dig 126. 12 Mod 244, 6 in 147.

But untill such separation is known he is as liable as before the articles of separation were made.

But a separation without a sufficient support, will not exonerate him for otherwise when he had effected a separation he could cast her upon the town or parish for support. But this will not be supposed. 4 Burr 2078. 6 Y.R. 604. Esp Dig 126-7.

If the husband and wife live in a state of maintenance the husband is not liable after the elopement becomes notorious than her credit. And when he turns her away for incontinency his liability ceases immediately, not depending upon the public knowledge of the fact. This tho, is supported by a number of modern authorities viz 1 Bos & P. 338. 1 Stra 647, 706. 12 Mod 24. 6 Y.R. 603. But the rule seems to me to be unreasonable as it would expose innocent parties. Authorities against it. Salk 116. 6 Mod 171. Esp Dig 125. 1 Blk. 442. 1 Lev. 8

The principle of this is that the law and indulgent, protects forever the rights of a wife. hence the husband is not only discharged while she remains in such elopement, but if she chooses to return he is not bound to receive her nor is he after such refusal to receive and to support her but is equally discharged as when she was in a state of elopement - but should he receive her he would be liable. 1 B & P 339, 337. 6 Y.R. 603. Stra 877 or 1877.

During the time of an actual elopement, whether it is adulterous or not, he remains discharged from any liability to support her. 2 Stra 875. Esp Dig 25. 1 Ros 696 Salk 116. But there is this distinction between an that is adulterous and one

which is not, so as to the same he cannot be entirely discharged but as to the entire the wife suffers a temporary forfeiture of her rights as a wife in so long as she chooses to remain in her adultery, alternately when the offender if he requires to receive her his liberty ceases. Yet State to be the true construction, tho. you will find it not quite so distinct in the Books, Sir Dig 125. Stra 875. 1 Bac. 299. 300. Yet and upon a case in Salk 119, that in the latter case he is not bound to receive a dispose, but this is not law.

A General Exhibition to Equity then after the husband offered to receive is not good. But he has a right to prevent strangers from obtaining the wife from him in order to his security. Lev 4. 1 Bac 217, 7. 1 Ch. 126.

But if the husband lives with his wife a lewd life with his family without having made adequate provision for their support, although she had left and still lives in a state of adultery he is liable for necessaries for the family provided the fact is true, and not known of her continuing. Whipham, Forrest, Bac. and is the analogy case. The upshot rule is that having her in such a situation he gives her public credit. Stra 647, 706. 6 T. R. 603, 6 Mod 171 Salk 119.

During the continuance of an elopement or adultery the husband is not liable. I have read and know they neither (is) the wife nor husband are who treats her during that period, nor (is) he bound to receive. The wife is not liable for she is a feme covert. If she was so the marital rights would be affected 2 B. & P. 1079. Doe 96, 8 T. R. 54, Stra 875.

There is a Modern Obiter Opinion, that the wife of an elopement is adulterous is liable Burrell v. 1 B. & P. 338

this State not to be land, for it is at the husband's election to receive her and if he does his marital rights cannot be affected that he will not receive her it is not given to the land, Nor is it in the power of the wife to sever these rights unless the husband agrees.

All the cases in which the wife can bind the hus. presupposes that he has not made suitable provisions for her. But if he does well provide for her, in her a right to protect all mankind from trusting her, for it is in cases only of extreme necessity, in which he can bind him. against his will, 1 Lev. 5. 1 Sid 109.

And tho he has plenty given her public credit yet if he afterwards makes suitable provisions for her at home and she continues her credit by a public proclamation he is no longer liable Salk. 118. 2 Ld Ray 444. 1006.

But he cannot by any act deprive her of necessaries until the hus. has revoked all claims to them. Esp. Ab. 122. 1 Atk 442. Salk 118.

If the hus. takes her away without a sufficient cause, no provisions gen or specific can extend beyond her support - 12 Mod 244 Salk 118-19. 2 Str 1214.

And if a woman elopes the same when she is found to leave the house, on account of intolerable treatment, In this State it was decided that when a child ran away from his parents on account of the cruelty which he received from them, was entitled to recover his wages of the father for his support, 3 Day 37-38. And this principle I conceive must apply to the wife.

The husband is in no case liable for money lent to the wife unless it is actually expended for necessaries and then he is liable in Ch. only and never in law, for money lent is never considered

necessaries. And the wife is never allowed to charge her husband for a loan of money for another reason, viz, the danger of its misapplication. The question arises why is he prevented or in other words? The reason is that at law, the husband is good "ab initio" or utterly void, for it being void cannot be made at law by any subsequent act, nor does the loan is void both in law and in equity, but if the wife expends it in necessaries, equity will consider the lender in the place of the vendor of the necessaries, and will refer him between the actual owner of the goods and no more Eck 279 Ry. Ind 502 Appx. 483.

Husband & Wife separate by deed and he stipulates (by deed) an allowance for her maintainance he is still liable for her contracts for necessaries unless he proclaims (says the contrary) by that neglect the condition is broken on which he had his discharge for liability if it was otherwise he would be liable by both wife & her support 2 d & E. 48.

How far the wife can bind herself by her own contracts during coverture

It is a general rule that the common law subjects family as her property during coverture by any contract, the reason assigned that she has no civil existence that it is merged in the existence of the husband. Where the husband no civil existence, 1 Co 42 Barr 2. But such artificial reasons are never in this country and therefore the latter reason the 1st that as the law either deprives us absolutely of all her property or all dominion over it, it would be inconsistent and be inconvenient that the husband should be liable for other to accounts which it has deprived her of the means. 2d The husband has certain rights which would be af-

-den on the title 3d. Here the title to improvements his marital rights would be affected.

Her contracts are not void at Com. merely but were absolutely void of course, which is not given satisfied, for being utterly void they are a legal nullity. 2 Bl. R. 293. 1 Pow. C. 90. 97. Salk. 7. 2. 3. 11 Mod. 144.

But if a feme Cov. makes and delivers a deed, and after coverture recollects it its is good, not from the time of making it, but from redelivery, which alone gives it effect because it is virtually a execution it is not an act confirming the first delivery as it would be in the case of an infant. Then the first deed was void only Cro. Jac. 201. 4 Rens. Rep. 20.

To the gen. rule there is one exception in the case of leases, which are voidable only this is allowed by the Common Law for the encouragement of agriculture Doug. 53. 2 Vic. 776. 3 Mod. 127. 7 Vic. 478. Gilb. 131. On dictum to the contrary 3 Bac. 304.

If a wife then makes a lease of her land during coverture, in the death of her Husd. she may avoid or ratify it. but she cannot avoid it during coverture, for the act of avoiding is as void as the act of leasing.

If she joins her Husd. in a lease for life or years and on his death, accepts rent she is bound, for this amounts to a confirmation. This means just a lease as Husd. & wife are not enabled to make by the 32. H. 8. for their leases for 21 years bind and cannot be set aside 2 Lands 180. n. 9. Cro. Jac. 563. Cro. 943. 1 Rolle 349.—

And if the Husd. survives her and she joins in a lease she is bound by the Covenants in the lease, whatever they may be for if the survives the case is "in status" Cro. Jac. 564. 1 Leon. 291. 2 Lands 181, n. 9.

If a lease is made to Husd. & wife, and after the Husd. death, she survives it, the survivor is liable on all covenants running

with the land. but not on those merely personal. as where the lessee will build a house on the estate. this is not implied in the full enjoyment of the lease, and all proper means for this purpose must be allowed by law and in equity, i.e. the is not liable in any covenants collateral to the enjoyment of the estate 2 Saund 180 n.4. Cro C 48, 1 Roll 348.

If an obligation is given to him and his heirs the may on the death of the first upon the benefit of, and of course discharge himself from any liabilities as his representatives on their footing. after his decease the obligation ends to the representatives of the heir. to their benefit. Com Dig B.K.R. Roll 348.

If they are made heirs in common the after creation may disagree to the function and discharge himself from any obligation or undertaking in the deed in favor of the grantees and on not refusal the grant will inure to the benefit of the heirs representatives. a part it will inure as the law a purchaser of the freehold and then descend to his heirs a representatives 3 Co 26 26, Com Dig B.K.R. 1 Roll 349.

But if the estate granted was a freehold the common law would it but in a court of record when it must be recorded, thus tho the law takes by parol, yet the common law by deed, and this on account of the infinite uncertainty in which the law holds a freehold 3 Co 26.

If an estate is limited to him & wife and a stranger, the husb & wife will take one half and the stranger the other. this is in consequence of their legal unity Lit. Sec. 291. Cok Lit 278. 227 b. If common in law the grant is to two persons only the husb & wife on the stranger the other.

If real property is conveyed to husb & wife in word which to two strangers would convey a joint estate,

it will not render them strictly joint tenants but quasi joint tenants. it does not make them Ks but more than joint tenants for they do not take out "per mi et per tout" but each takes by entirety this is in consequence of their legal unity. from this results an important practical consequence, viz, that the husb cannot dispose of his share nor even a portion of it. and there is no, need of saying that the wife cannot also dispose of her part and the only way to convey is for both to join in the fine, a common conveyance, 5 Co 54, 2 Levinz 39, Co Lit 187, 9 Co 140, 2 Ver 120. the reason is, that he should not be enabled to alienate his rights of her survivorship for since the husb cannot defeat the chance of his right to survive should the husb. the wife.

A Feme Covt may convey land vested in her on condition of her conveying to another, and this is without subjecting a loss of her entitlement. of course it could be no injury to the husb's interests and if she did not convey it was not in his power to do this it. 4 Levinz Dig 21, Com Dig B & F, p. 3.

As Modern Cts of Chancery allow the wife to hold a separate property that is by what Cts pretend to be bound as to her property when holden but not her person, or rather that Cts assume to bind such property in equity and leaving over the person as to this she is deemed a feme sole against this view of the objection of the general one also because the property is not in the actual of the husb. neither is her body liable so as to affect the marital rights of the husband. Foubly 40-1, 52. Ves 5. 7. 1 Br 24. 16. 2 N R 163.

But at Com Law. in this case she is not bound though her person is not liable on the contract. 2 Ves 190. 1 Bro. 603. 2 Atk 379. 1 Ch Ca. 10. 1 P. C. 36. 334. 2 N. R. 162. 2 Ph Ms. 44.

Whenever her separate property is bound it is only in a Ct of Equity and this is necessary for if the case could at Comm. Law both on mesne & final process her person would be liable & thus the marital rights would be violated and her own rights as a feme covert affected. But these consequences do not follow in Chancery.

The her separate property is in the hands of trustees in trust for her the cases by her consents are given of it in Chancery and this institute the intervention of trustees. If the trustees have no interest, it is all in the cestui que trust, with if the hus. interest ceases for as B. this he is a stranger. Pol. 60-1 Pres. 57. 2 it 190. 1 Tally. 193.

But if it is merely that the trustees should give their consent and the other not to join in a conveyance which the husb. ought to be allowed to make Equity will compel them to join.

But there are certain cases where the husband merely in Law but all these cases are where the law regards him as a sole.

Thus 1st If the husb is convicted & pardoned the wife. The husband himself in his contract for instance as a feme sole. 2d If he is transported for a crime 3d If the hus is an alien owing to if the husb is an alien owing this forget is pretty strong toward. for this 1st clause 1 Bla 29) the husband himself as a feme sole so long as the hus remains an alien owing for so long he is regarded as a civilite mortuus 4 Co. 55 the custom of London, in many cases be mentioned. 1 Ro 75-7. Bac Dig 12. Co. Lit 14. Coke 132. b. 133a. 17. Ill 26. Fitz Ab. Forf. B. 4. 37. 2 Ld 23.

In these cases the husband is considered

It may be in these cases that the hus is civiliter mortuus is quite artificial. and I think we can find a more satisfactory reason. I think, he must give there is per usque & recently he as a feme covert, on the ground of his non-liability or on account the marital rights. Hence affected. second. This is

necessary that the stand be able to find security, in order to procure necessaries. For if the wife not the husband suffer.

The case has been held the same where the husband was a foreigner and had remained abroad, long time without returning, for this is equivalent to a separation. This rule is in force 2 Eth. Ro. 534 — 7. I. B. & P. 357.

Where a person "a man or woman" the legal is shall be deemed the husband to other the contract as a feme sole. Bac. Ab.

Husband and wife separate by articles of agreement and the husband makes a suitable settlement on her, it is held that the wife at Common Law is bound by her contracts, and should pay necessaries, but in chattels it may be. This is as settled in Cowper 54 1. Ro. 5. But this is now overruled. 8 Ve. 345. and has been uniformly denied ever since 5 Ve. 682. 4 Ves. 616 605. 1 Ve. Bro. 334. 347 — 8. 350. 2 Ch. Ro. 163.

The case in 1 Ch. Ro. went further than any case preceding the first case was when the husband lived in Ireland and the wife in Eng. under separate maintenance. The court held in this case that the wife was liable for her contracts in necessaries but went no further. 1 Pas. Con. 78. 80. 100.

Lady Langsborough case. this case alone was overruled. Ow Con 78. Bis. Deg 126. 2 Bl Cha. 585. 587.

Stand Law said in the first case, that they both lived in Eng. but apart, wife under a separate maintenance.

2 In another case she was held liable because the husband was abroad and the husband lived entirely out of the land as a feme sole, and treated as such. 1 B. & P. 357.

But all these cases are now overturned by great weight of authority and it is now settled that in no most case can the husband be sued. 2 Ve. 545. 7 East. 179. Ne. 301. 2 B. & P. 226. 1 Selw. 267

The liability in case of breach of covenants under the clause mentioned, remains undisputed law. But mere articles of separation with a settlement for support, only, never render the husband liable in contract for any thing whatever, for it is in the power of the parties, for it is in the power of the husband, and it should not be in the power of any third person to prevent it.

The husband's property is not bound in equity for his general personal engagements, such as Bills, Notes, etc. Bills of Exchange &c. nor by any contract creating any personal debt or duty. — The contract to bind the realty or to render that liable must point it out specifically, as in a covenant to sell or bond to convey it. And even if his general debts were incurred for unpaid his real property would not be bound. 2 N.R. 163. 1 Ves 517. 1 Br Cha. 10. 20 1. The reason of this is that a decree of Chancery acts "in rem", for it cannot act in rem unless the property be concerned, and this must be taken from the contract. If the parties designated the realty the decree cannot reach it and the contract is a personal one. But the decree cannot touch the person, if so the property rights would be effected.

So also when a remedy is sought against a wife living separate from her husband, under a settlement of maintenance, by articles, it must be proceeded in Chancery as in the other case.

But the sole and separate property of a feme may be applied by Chancery in discharging her personal engagements, so also the rents and profits of her own real estate.

But a feme Covt living separate from her husband by articles but having no settlement of mere

-tenance, is not liable for her contracts for necessaries, matter in Law or Equity. But her contracts will bind her Land. 4 Ink. 766, 5 Co 682, 6 Co 604.

If a feme covert levies a fine or suffers a common recovery she is bound by it tho her Husd is not and he may defeat it during coverture, and after the wifes death, provided he is entitled to entering, and this he does by entry. 2 Co 74-78, 10 Co 43, 1 Vent 300, 1 Rol 22, 2 Bl Chan. 336, and if he was not entitled to do this, he would in the one case be deprived of the "usufruct" and in the other of his life estate, The Wife is bound on pain only of estoppel i.e. she is estopped to aver that she was a feme covert. There are some opinions in the Books maintaining that the cover bind herself only by a fine, But State the latter opinion to be that she can by a recovery also. 1 Vent 300, Co Lit. 326, 1 Ro Abr. 341.

When the husd joins a fine after the death of his husd., she is bound by the warranties in the fine for the warranty is merely an executory agreement, between the parties 1 Ch. P. 43, 1 Sid 406.

If the husd. joins the wife in the fine &c they are both bound "ab initio" 2 Co 43, 2 Roll 395.

These two were the only modes in which a feme covert could dispose of her real estate but at this day she may do it by virtually executing a power over an use. This doctrine of uses shall soon explain. The law contemplates her acting under a power and her as the property of another tho that property might have been her own. And in Equity she may also dispose

her estate virtually by her declaration of a trust.

At this day a feme covert may convey by executing a power over an use, or 2dly by a declaration of trust, and either are good both in law & equity. Pow Dev 150. 105. 1 Hardy 300-1. 1 Ves 140. 2 Ch. 695.

If a feme covert having a separate estate permits her husd. to enjoy the rents of her land & the interest of her personalty the is presumed in Chy to have abandoned it to him, but this presumption may be rebutted, and she may recover it back, as if she permitted the husd. to take them under an agreement to be repaid by him. 1 Pow Con. 422-3. 2 P Wms 92.

A feme covert, under the Stat Eng. of Wills 32 Hen 8. could not devise, tho the word of them stat was very general, allowing all persons to devise having estates in fee simple yet the judges in the next year after the passing of this Stat. held that the passing of this Statute extended only to those who at Law could claim a fee by deed — and this is expressly cited by the explanatory Statute, 34 Hen 8. Cap. 1110. 1116. Dyer 34 b. 1 Ves 300. 4 Co 61. Co Lit 112. Bac 556. 2 Vol 2.

Under Const. Stat of devise, it was determined that there may be a devise by feme cov. Hill 138. 195. But this was overruled by the Supreme Ct. of Errors, and title property too, 2 Day 161 & 183. But now a feme cov. is enabled to devise by express Stat. enacted for that purpose. But it does not seem to be to affect her Lord's right &c.

It is a general rule of the C. Law, that the covert make a will of her personalty, for if she

does not become the husb.d by the marriage he has an interest in it, but the better reason is, that this inability arises out of the disability of coverture 4. co 51. 2 Ewst 552 Sir Ralph Allen 212 & 212, 2 Blk. 498, Offin of Ex 196, a Wentworth Offin of Ex. 196.

But it is said she may bequeath goods which she holds in the right of another, in the Character of an Exec.x. This is cited to prove that, an incapacity to devise in any case, arises not from a legal disability But the fact is all she can do in this case is to appoint a Executor, for she is not able, to dispose of one single particle of the property thus holden by her, she does nothing more than exercise a power over it, only appointing an Ex.r and this office is always revocable 2 Blk 498, 2 Ewst 552. The true explanation is found in Godolphin 101. 110, 111. The expression "That a Feme covert make a will means nothing more than that she may nominate an Exec.r for appointing an Ex.r is nothing it will lend to constitute a will it is merely that there should be bequests in it.

In Equity she can dispose of her separate property. But this is one of those exceptions to the Com Law. Tooley. 98. 2 Blk. 498. 1 Ves 518. 1 Br Ch 16. 3 Ch 8. 2 Ves 75, 140-1

I have found in Beaus or Bacon on Eng.d Law that she may bequeath her paraphernalia, this is so when she to be found. 4 Beaus or Beaves this Eng.d Law 72. 74 The above authority is Reeves this Eng.d &c.

She may with her Hus.d's assent bequeath any part of her paraphernalia, but in this case, the act is on the power i.e. the consent of the Hus.d which tho, not by deed gives it validity and in this manner the assent

bequeath his personalty, also 1 Ver 245, 2 Ver 253, 3 Atk 695, 2 P. Wms 82, 316, 2 Bk 488, 1 Atk 267. That its whole force and effect is derived from the consent of the husband is apparent from another rule, viz) If the husband consents to her bequeathing all her property accruing to her after his death, the bequest is void, 2 East, For over that property he has no controll.

If a feme sole having made her will marries and died before her husband the will is void for by the marriage it is revoked this rule holds both of the wills are here alike, for during coverture for during coverture the wife cannot revoke her will But it is apparent holding with that a will may be revoked it, That it must be ambulatory from its nature to its consummation, 2 P Wms 624, 1 Atk 60, 2 Vk, 695, 2 Bk 499,

But if the husband consents to the wife revoking, because he has then the power to revoke and if she does not, the presumption is that she shows it to stand, this is the law as laid down by Godolphin 29, But La Rengon says "agreeable" That it is inseparably incident to every will, that it can at all times be revoked, and if it is for an moment suspended, the will is gone, and the revival of this power will not restore it, 2 Vk, 682, 2 Vk, 689, & 68-9, 2 Bk 499, Notes,

But I am of the opinion of Godolphin, that if the husband the Coverture and does not revoke the wife's will stand, and the regard or observance seems been a feme sole.

But a will made by her during Cov. is not revoked by the subsequent death of her husband

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and this follows from a very general rule, that an instrument void in its inception is not rendered good by any subsequent act, Pow D. 172, 2 East 552, Yelv. 246, 16 qu. 3 Cas. 171. Salk 338, 11 Mod. 123

But there are two ways by which a Feme Covt may devise i.e. is virtually enabled to devise, Then of mere first premises, that she may execute a naked power or authority. of this there is no doubt. i.e. the may execute a deed, or affix a seal, or assign for another, but it is to be remarked that her interest is not thereby affected, as if she is empowered by S.S. to sell his land to another, this is a ministerial power, Co Lit 112. 4 Cruis 21, 236-7, Com Dig B. Bar & Fem. E. page.

This rule is important, inasmuch it is the basis on which is erected these powers of virtually disposing. I should have observed that a naked authority is one not coupled with an interest,

The may a power when an interest passes with the power provided the power is collateral from the interest and does not flow from it. Then expressing I take to be convertible for when the power is collateral and does not flow from the interest, it does not alter it 4 Cruis Dig, 236-7. Co Lit 112, a, n. 6, Latch 139, 1 Bl & Ayl 192 Com Dig P & F. 3.

[illegible] a feme covt has estate in trust to be conveyed to another, or he conveys to her on condition of her conveying a part to her children when attains a certain age & the other part to a third person then she cannot convey and a forfeit her estate,

But a power arising out of the interest she cannot convey as if S.S. had devised to her and her heirs with power

to convey, but if it is not given she is entitled to convey, and is the object so to do, to preserve her own interest for if the power of convey she does not possess her interest, hence if she can convey, she disposes of that which was her own and if she can convey she might always be in a capacity of disposing of her property upon best at sale, by only having it settled in her remainder with such power,

As she may convey the property of another by a naked power over it, so may she her own interest, provided it is settled upon her by way of trust or use. Fev. D. 150, Prec. Ch. 300.: "Such a feme sole, conveys her estate, to third persons to the use of herself for life, remainder to the use of such third person as she should by any writing in the nature of a will or deed appointed, - This is merely done on the eve of marriage. Here the has disposed of her estate, when she had full power, reserving to herself an estate for life, and therefore, now the exercises disposal of her life estate. As to the remainder of the estate the has conveyed it to third persons in trust for some person or persons to be designated by her. 2 Ver. 191. 610. 1 Ch. Ca. 346. 2 Vk. 695. Fev. D. 150.

Now during coverture she may designate by deed or devise the certain cestui que trust, and the third person will be compelled to convey to them. Then in respect of land by such deed she is not disposing of her property, nor does the interest rest in the cestui que trust, by such deed or devise, but under the original deed made by her, when sole it was thus (changed) conveyed to the trustee, power being reserved by her to point out who such persons were i.e. the second the privilege of devesting their interest, & have been conferred as use and a trust together, & will with the example again, (Common Robbins)

Ex. of an Use A Feme Sole conveys to a third person, a person, her estate to the use of herself for life remainder to the use of such persons, or person as she shall by any writing in the nature of a deed or devise, appoint, Now, the donee's estate, by deed or devise, can under her revoked power received, limit the remainder to Stat. 1684, and the moment they are designated, join the Stat. of Uses the remainder vests in them by this Stat.

Seconds. A Trust, A Feme sole conveys to trustees in trust, for herself for life remainder in trust for such persons as she shall by any writing in the nature of a deed or devise appoint, This is called an opt. estates and will be supported in Equity, as a trust is purely within its cognizance. The former is called a power per an use, in both of them she virtually devises or conveys by deed, Pow. D. 150, 165, 2 Y. R. 695, 2 Ves 192, 1 Bdk. 192.

A Feme Covert may during coverture receive to herself a power of devising, but it can be done only by a fine, as: If she levys a fine, to herself for life remainder to whomsoever she shall appoint by her will, Pow D. 149.

In Equity she may bequeath her personal property by an agreement, to that effect made by the husb. before marriage but it is the agreement alone of this that gives it operation, This agreement at Law would be supported at Law by marriage, But Equity holds it binding in conscience,

But a power to convey by deed to land of another, she can execute without an use or trust interposing for the is deemed in judgt of law, a mere agent of another, Pow on Powers, 312, Noy 80, Salk 239, 2 Bdk. 192.

When the wife, executes the use, & declares the trust. The appointee in either case is considered as taking the interest in coming under the original instrument giving the power of executing it.

Tho there is no actual settlement to an use, or in trust, yet if there is an executory agreement for that purpose before marriage, the wife may declare the use or execute the trust, as if the settlement had in fact been made. But Equity considers an executory agreement, binding (in equity)

Arrangements between Husb. & Wife.

It is a general rule of Law that all contracts made between Husb. & wife are void "ab initio" and all made between them before marriage are dissolved by the subsequent intermarriage Co Lit. 112, 254, Co Cam 55b, 1 Bl R 442.

The usual reason assigned is that the existence of the wife is merged &c. But stripped the better reason to be 1st That by their legal union the rights and duties of both meet in the same person, 2d. a many of things would be nugatory by reason of their mutual rights, for if Husb. is bound by Covt. to the wife he could receive nothing but what is already his own, or what he might obtain by other means, and if the wife had Jointure or separate It would immediately become the Husb. Thirdly, It would be contrary to the policy of the common Law, where there is no remedy. But to say that there is no remedy, but a right, and this right can be enforced is a legal solecism. From this it follows, that if the wife of a deft. in a suit is made administratrix, or appointed executrix to the Plff. the right,

of action is destroyed, for she cannot maintain a suit against her husband 8 Ch. 407. so if in this example the Ptff before his decease, had obtained Judgt and imprisoned the Deft, the wife could not be imprisoned but he must be entirely discharged. And another reason is that the trust of Equity, devolves on him, in which case the debt at law is extinguished.

To the gen. rule there are Exceptions, First As to those contracts made during coverture, At Com Law, no contract respecting the personals can be binding upon her for the above reason, under the C Law, does not recognize a right, in the husband to hold personalty, separate from her husbd. But by the C Law the may hold real property, 1 Ch. R. 9, 1 Ch. Ca. 336, 345-6. 1 Pow. C. 84.

A Deed of real property by husd to wife, is and always has been void, and it was equally void in Equity, under its maxim rules. This rule, because he not may it valid to the wife, but there the husband has no remedy, to enforce his covenants, C. Lil 3. a. n. 1, 112, 1 Pow C. 84 46 24. The law does not recognize that separation of Rights, which the contract necessarily supposes

But the mod rules of Eq., are different and it is held in that Ct. at this day, that the husd can convey real property directly, to the wife, from sole and separate use, and this without the intervention of trustees and also that all contracts of the husd respecting that property thus held, whether made with the husd or third persons, will be binding in that Court, for they can act upon, and controll, such property, authors concurring, the marital rights 1 Ch. Ca. 94-5. 102. 1 Ath 270. 2 P Wms 316. 2 Ves. 669. 1 Ab. 163, 517. 1 Br Ch. 162. 2 Mod 159.

But this cannot be good at Law, for if so there must be a remedy, and if so one would be held to prevail from the other. Cases have held that the intermediate of trustees were necessary. 1 Ver. 44. 2 Ver. 385. 6 Seb. 3. 3 Atk. 72.

Even at Law, a conveyance by Tenant to strangers to the use of the life was good. (This raised the doubtful question.) In this case the law knows nothing of the use, all that is regarded is the legal estate, and Equity takes care of the use and gives it effect.

But since the Stat. of Uses, which executes the use, it vests the legal title in the cestui que trust. Such conveyances are void at Law, in Infancy under 4 Co. 29. 2 Atk. 337, 332-3. 1 B & P. 146-7.

If the Tenant to encourage the marriages of his wife, agrees to allowance his wife's of the wife's labour he will be compelled to execute it in Chy. 3 P. Wms. 287. 1 Ch. Ca. 92. If the life takes a remedy in Equity the must appear by her prochein ami by Trustees against the Bill be filed, tho in her name. 1 Atk. 278. Rochan. 146. 2 Equity Cas. 131. 2 Ch. R. 163. 1 Ver. 67. 44.

There is a decision in a case in (Cases) Ven. before L.C. of Ewen in Court which allows that a feme covert. cannot hold personal property to her sole and separate use. 1 Day 221. 2. 35 But this has been denied and it is now held that the law has generally in this way, as well in this country as in Eng.

4. "Donatio causa Mortis" is good at Law, as well as Equity for this is strictly testamentary, the delivery in the life time of the donor, to take ultimately should

he not survive his present illness so that like a legacy it depends on the death of the donor to vest in the donee; but a wife can be a legatee when husb. Co Lit. 3.a, n.1. 10 Mod 441.

A court by the husb. whether before or after marriage, not intermeddle with his wifes property, is binding in Equity. The law, no remedy for a violation it is true, but the can have preventive justice, have the husb ordered by Ch. to refrain from a future violation, 1 B.C. Cha. 377. 1 B.Ch. 334. 341.

Living Seperate, In another class of contracts are those made between husb & wife to live separate, and these are now enforced as well at Law as Equity, so that both are bound by such agreements. This is a doctrine wholly unknown to the ancient law, 2 Kent, 217, 2 Ver. 386, 671. 3 Br Ch. 614 & note 22, 1 Bur 542. 2 Br Ch. 377, 2 Eden 253.

If the husb in violation of such an agreement should compel his wife to live with him she may obtain her discharge by a writ of habeas corpus. 1 Bur 542. Com Dig Bar & Feme. C. Stange 478. The law admits of this common remedy, because his person nor property is disturbed, neither are his marital rights for by his violation of separation he has parted with them.

But the parties are bound only to the precise extent of their agreement. So those men who live seperate do not deprive them of their right to the other property, or as to their children they are the same as before such agreement. The husb can claim all property subsequently acquired by her. and the wife

his down in all his Land's estate, &c. But if the agreeing goes farther and dissolves such claims, then they are extinguished. Bac. B. 4. C. 1 Ver. 250.

Second Branch of the gen. rule, is that all agreements before marriage between them are by the subsequent intermarriage dissolved. This is on the same reason Co. Lit. 351. 1 Bulk 442. Agreement of the Husband was that after his life before marriage and even in a Bond was cancelled. The bond and debt by the marriage is extinguished and cannot subsist in his death, in a personal contract once suspended is forever extinguished. But a Remedy once suspended may afterwards be revived the once suspended, as the Stat of Lim. For if a Personal contract for one moment ceased. How is it possible for it to revive and again exist. 2 H. Blk. 10. Hob. 10. 2 Roll. R. 254. Co Lit. 351. 1 Blk. 442.

If the obligee of a Bond marries one of several obligors the marriage is a discharge the whole. For the obligee discharges the indebtedness of the indebtedness of one is the indebtedness of the whole. Where if one is discharged the debt is released Co Lit 351. 1 Finch. 98. Com. Dig. B. 4. P. 1.

There is a distinction also taken between a contract before marriage to be executed during coverture and one not to be performed entire after. The former is discharged, but the latter is good. As if a covenant to leave his intended wife if she survived the covenantor a certain sum of money. This is good both at Law and Equity, here it is to be remarked that the husband

under no liability during his life. The wife has no right under it until his death, i.e. her right to the benefit does not accrue till then, and then she has a remedy as her husband's representatives. This does not annul the marital rights. 1 Freeb. 83. Co. Ent. 57. Salk. 325. 6. Mod. 216.

It is to be observed that this rule is predicable of contracts, covenants &c. But as to a penal bond conditioned to leave her a sum of money on his death, it has been much disputed whether it was good or whether it would be avoided by the marriage. Those for the latter opinion contend, that the penal part of a bond is a personal debt and of course a debt on of the bond. Of this opinion was La Holt, Salk 235 Ladd 511. But the other judges were against him and his opinion is in no precedent. Com Rep of Comm. Rep. 67. Thus for a long time the case stood La Holt's opinion vs that of all the other judges. But it was of not weight enough to balance. Ch. adopted his opinion that it was not good at Law. But this dispute notwithstanding the Bond was good in Ch. 2 Ld Ken. 243. 2 Ver. 480. 290 2 Atk 97. Richam 257. This question came up at last before Lord Hardwicke, and it was held by him and all the judges that it was good at Law, 5 T.R. 381-3.

This must be collected on principle, for tho the penalty is "debitum in presenti" yet it is only "in terrorem" and besides no particular evil result from it since no remedy could be had on it during coverture. of course it is not inconsistent with the disability of coverture nor can the marital rights be affected.

Settling of Jointure. Another contrive of this class is that of settling a jointure on the intended wife. This is valid both at Law and Equity and the way by accepting her jointure be herself of right of dower and when it is in stead of her dower it is considered as a purchase of it. and during no period was this kind of contracts made in lieu of dower, deemed to be binding, and as it cannot take place until his death, no rights of the kind can be effected; or the marital rights are barred, neither can it be against the policy of the Law, Co Lit 36. 4 Co. 1. 2. 2 Blk 137-8. 1 Bulstr 173.

There are certain requisites to be observed else the jointure will vest in her but not bar her dower. The first requisite is that it must take effect immediately on his death. Second that it must be an estate for her own life at least. Thirdly it must be limited directly to her and not in trust for her. Fourth the jointure must be expressed in the deed to be a satisfaction of dower. There are statute regulations of 27 Hen 8. introduced to prevent the hardships of Co Lit 36. 2 Blk. 138. as to the last requisite there is a difference of opinion and held it need not be expressed in the deed but may be proved by parole, 4 Co 3. 2 Hen Blk 138. n. when opinions of Ther. on right depend upon the construction of the Stat. I have stated and it may be that the 3rd requisite be decided, but Christian says differently.

The Books say such and such things are necessary for a good jointure but by this is meant to make such a jointure as will bar dower.

It is a requisite that it must be a freehold at least. But an agreement before marriage to accept pecuniary provisions in lieu of dower, may be enforced in Chy. It is not the rule understood; that it must be but that it may be. and whether such agreements will be enforced depends upon the Equity of the case. But the above rule of equitties are merely in a Court of Law. For there then can be no discretion exercised like that in Chy. 1 Pow C 55. 2 Ves. 55, 2 Eq. Ca. 101 2. Co Lit 36. b. 5 Br Pa. 64, 570.

When I first became acquainted, with a rule in Equity it seemed to me, must take repealing the Stat. But I am now satisfied that it is as it ought to be for Personalty is oftentimes more advantageous to her than realty

The requisites in law are regarded only as a protection to her, but Equity can decree upon the reasonableness of every case and will guard her from any liability to injury from the donees,

If a Jointure is settled after marriage she may on the decease of the husband accept or refuse it. The settlement being made during coverture she is not bound by it. 2 Bl. 138. 1 Bulstrode 137,

But in this case the woman take both, so that by the act of having a wife of dower the women act claim to the jointure. Com Dig B 4. S. 4. 3 Co. 2. 7. a. 5 b. 56. a 5. b.

If the agrees to accept a gift by devise in lieu of dower, on the death of her husband she may elect either the dower or the legacy. for she is entitled by the agreement it being made during coverture, and she will take both unless the legacy is expressly given in full of dower. this is not Chancery jurisdiction

and dower for a portion in its own substantial nature is a substitute for dower 4 Co. 4.5. Cro E. 128. 2 Ld 365. 2 Atkins 483.

It was also decided that the Testr's intention that a legacy should be in lieu of dower might be pleaded by parol. But this is now denied. 2 Atkins 483. 1 Equity Cas. 289 & 239. 2 Ves 366. 1 Bro. P. C. 593. This rule is founded on plain civil principles, for the Testators intention is to be found in the instrument itself. But when pretend the devise may imply as if the Testator had denied among all the rest of his estate this circumstance is conclusive that he intended that his wife should have only what he bequeathed her or he would not manifestly express an intention that another should have it, Cro E. 128. 2 Atkins 488.

<u>Marriage Settlements</u>. Another class of cases made before coverture that are not defeated by the subsequent intermarriage are. Marriage Settlements. There is a general rule binding in Chy. after marriage and many decisions in that Court during coverture. This rule adheres on the same principle that governs jointure and is substantially the same. 1 Bro C. 444. 2 id 255. 2 Ves 480. 493. 2 Atk. 97 & 99. 1 Ambly 87. 935. Now all these class of cases are exceptions to the general rule. "That contracts made between persons before marriage "are defeated by the intermarriage and that all those "made during coverture are void because of the disa-"bilities of coverture."

Husbands power over the person of his wife.

If the wife is injured in her person, the husband if he sustains a consequential injury may have an action in his sole name for such consequential damages, but he cannot sustain in his own name a suit for the immediate injury to the wife as if his wife was injured that he lost her service. he says his action with a "per quod servitium amisit" This was the former mode but now it is "per quod consortium amisit" This is the basis on which he sustains an action of Slander against the wife Ow Pun 501. Ow Cas. 89. Salk 206. 1 Lev 140.

It is on this principle that he sustains an action for criminal con. with his wife, and indeed the consort be a party in this for the is "particeps criminis" Ld. 205. 7. Bul. 27-8. Esp Dig Doug 182. But to maintain this action it is indispensable that there has been a lawful marriage and this be cause it partakes of a criminal nature (Bates Ec. 330. 1 Selw. 19. & is anot)

But if the husband consents to the act, he has no action for. "Volenti non fit injuria" 4 T.R. 651. 1 Selw. 13. 15. And it was once held by Ld. Kenyon. that if the husband was in open habits of incontinency he would not sustain this action but this is now overruled for his conduct cannot be any justification it can be no excuse. but this fact may be given in evidence to mitigate damages, but it cannot be given in evidence to mitigate damages. but it cannot be a bar to the action 4. Esp R. 16. This authority says it is a bar, but is overruled in 4. Esp R. 269. 1 Selw. 15. n. Phil. 139.

It was once held that for incontinency with the wife the husband could not sustain this action after they had separated

or for, Sum Cos. after separation. This is overruled and is not Common Law, for that separation is not always lawful but by the contrary is oftentimes temporary 5 T.R. 337. Dig. approved in Bart 6 vv. 244. 1 Selw. 16.

When the husb. refuses his wife to live as a prostitute he cannot have this action, but if she then lives without his knowledge he will have this action and the fact of her course of life will be given in evidence to mitigate damages. For if this fact existed, the def. could not be as culpable as he would then have been, had he received her, and it is the seduction in such case which is principally regarded, Bul NP. Nisi P. 6. 1 Selw. 15. n.

Any neglect of the husb. with regard to his wife's conduct may be given in evidence to mitigate damages, but it can by no means amount to a justification 4 T.R. 657. 1 Selw. 15.

There are many circumstances which may be given in evidence in mitigation or aggravation of damages. Evidence in aggravation: As that his wife was of good standing in society, was virtuous and amiable, that her character was fair, that they, until the seduction had lived in happiness and also that the def. received her by means of the laws of hospitality, and act to deceive her of prudent friend, &c. and such circumstances will have powerful influence in the amt. of damages.

So on the other hand, the Dept. may show the Plffs. before previous ill deportment, as fornication and even particular acts of incontinency also that the husb. treated her ill, turned her away, neglected to support her. This is admitted because the case is one of those in which damages are more purely vindic-

-uptive than any other. 4 T.R. 6, 57. 4 Esp R. 16. 2. id. 562. 1 Phil. Ev. 140. 1 Selw 301. Bac 27.

According to the old Law, the husb. had a right to give his wife "moderate chastisement" for reasonable cause and indeed the C. Law gave him a right in this respect equal to that he had over his children and servants, this was allowed on the ground that the husb. was liable for the conduct of the wife. 1 Salk 113. 116. 1 Hawk 130. 1 Bl R. 444. 471.

Even under the ancient legislation of the Law, if he found her in adultery a threatening the same the could bind him to the peace, by a "form of supplicavit" in Ch. or the might have a divorce "a mensa et thoro" 8 Mod. 82. 1 Bac 285.

But this right of correction is not at the present day regarded as law, and should the husb. now, use any personal violence the may bind him to the peace, there is no case in which this is sanctioned but the courtesy of the last age, gave different impressions in this respect, Justice Buller held that the right existed in his day and he has not long been dead. The relaxation of the old Law commenced in the time of Car. 2d 2 Lev. 128. 1 Bl R. 445. 3 Hobb 433.

The husb. may restrain her of her liberty in a reasonable manner, for a reasonable cause, as Prof. his conduct, It may be done to prevent her squandering his property, or to keep her from bad company. But in case of an unreasonable imprisonment, or if he confined her in a dungeon, or in case she is confined without cause, she may be released by Hab. Cor. Str 478. 1 Bac 634. Com Dig Bac. Ho C.

She may justify a Battery in her defence, and "commoro" and either may justify as if they done it in their own defence. Co Inc 239. Le Ray. 62. Bac 18. Esp Dig 114-15.

Of the admission of the evidence of husband & wife for and against each other

The gen. rule of the com. Law is that they cannot be admitted as evidence for or against each other. Co Lit 6.a. 1 Blk. 443. 4 Blk 695. This is founded on a two-fold reason, 1st Unity of interest and 2d the Policy of the law. As their interest is joint if they testify for each other they testify for their own interest if against each other they testify against their interest so that in either case a strong temptation for perjury is presented. also if they testify against each other it tends to produce disaffection & to disturb their domestic quiet, which would be against the policy of the law. Peake Ev. 175-5. Bac 286. Esp Dig 720. 1 Blk. 443 note 1. Phil. 63. 4. 1 Ld Ray 62-8-70. This rule applies both in civil and criminal cases.

It is a gen. rule of Evidence that any one may testify against himself &c. if the opposite party consents. consents in favor of himself But this rule does not obtain between Husb & Wife Gilb. Evi. 264. Ray. 1.2. Co Lit 6.b. Peake Ev. 175.

The Husb. cannot testify in a case, where his wife's interest is concerned, nor the it could be against his own interest, as when the wife's sole and other property was taken in Execution by her Husb. creditors. Nor an action by the trustees against the Officer the Husb. is not com-

competent for them to prove that the Property was the wife's. But it would right against his interest and there would be no danger from his testimony on that ground. But he cannot testify when his wife is concerned. 4 T.R. 678. 2 Ld. R. 331. Eth Dig 720. Phil. 64.

If an action is brot by or against the husd only or against husd & wife jointly, her acclamations out of Court cannot appear in evidence. Thus if the husd brings an action for the wages of her labour her expressions out of court that she had received full pay cannot be admitted in evidence. Wms 577. 6 T.R. 688. Bul 28. Phil 64 Evidence.

So if an action is brot against husd and wife jointly for trespass by the wife her expressions out of Court that she committed it cannot be admissible evidence against the husd. Stra 894 & 1394. 7 T.R. 112. Phil Ev. 64

Neither can they give evidence in a suit between third persons that will tend to criminate each other. E.g. a question arose as to the settlement of a pauper between the King and a Parish. The pauper claimed a settlement and in the parish of A. for there lived his parents and there he was born reared &c. and to defeat his claim his parentage was disputed on its being supposed that the father had been living with a prior wife. This first wife could not testify to the marriage or &c. the criminate him, proving him to have been guilty of Bigamy. 1 Ld Raym 162. 2 La Ray 752. 2 T.R. 263. Ray. 1. Peake Ev. 174. 1 Th Ev 66. Eth Dig 720. and it has been said that if a man has been examined as to a fact and which in its nature must be known to him, yet that the wife cannot be called to the same point, to contradict

him, for it would, it is said, expose him to the charge of perjury 2. Ch. R. 263. 1 Phil Ev. 97. The rule is that she shall not criminate her husband. But it is going a great way to deprive the party of his witness.

A woman divorced "a vinculo matrimonii" cannot testify against her husband to any fact which occurred before divorce, and this is founded on the best of principles for if it were admitted it would prevent that sacred confidence in and other which it is the policy of the law to encourage, 5 or 8 East 92. 1 Phil Ev. 65. Peake Ev. 17th Appendix 44.

But she may testify to any fact happening after the divorce which is known to her, for here can be no sacred relation of conjugal confidence, so that in fact one she may testify for or against him. (ii. authorities)

If a feme covt. prosecutes an action as a feme sole, and the defendant her coverture the husband is not competent to testify to the fact of coverture, for this would testify both against her interest, and contrary divulgée against, 2 Ch R 205-9. Peake Ev. 179. Phil Ev 64.

But there are Exceptions to the gen rule,

If the husband is indicted of high treason, the wife is a competent witness against him, and undoubtedly "a fortiori" The reason assigned for this is that the duty of a citizen is superior to every other duty, But the case is denied by considerable authorities and it is difficult to tell where the least of authority is. In support vide 1 Phil Ev. 119. 1 Hale Pleas Cr. 45. Bac. 286-9. 2 Rebbe 403. Contra 2 Hawk 608. 1 Hale 301. n 301. Peake Ev. 173. Phil 68. Chief of them are very modern.

Second Exception to the gen rule is—When the wife exhibits a complaint against her husband for the peace, she is

a competent witness and "vice versa". This is supposed "ex necessitate" for otherwise the wife would be liable to great danger, for a malignant husband could easily find opportunity to slay his wife when no witness could be nigh to testify to his complaints. 2 Hawk. 432. Mag. Ch. Stra 633.

Third Excep.n to the gen. rule, When the husband is prosecuted by the Public for personal injury to the wife she is a competent witness against him. Shelton 115. 1 Mc. Cal. 145. 172. Phil 68. Stra 633. Bac 287. 2 Hawk. 303. Esp Dig 721. Peake 173. 1 Bth 443. Christian Notes. 1 East P.C. 454. This rule is denied and denied. But 2 Hawk it is planted on the dangerous grounds of public authorities against it Cole 1 Pick Ev. 120. 1 McCal 161

Fourth Excep.n to the general rule is. If after articles of separation the husband attempts to compel her to live with him. In a prosecution for this offence she is a competent witness to prove the fact, for the same reason (for she is the object of his criminal conduct, Cro Car 488. Esp Dig 721, Bac 286. Peake 174. 1 Phil Ev. 67-8, 2 Hawk 608.) the remarks of authorities between these books are not directed to the above criterion, but placed down by mistake, &c. Authorities to the above Exception to the gen. rule are. 1 Bur 543, Bac 287. Phil 68.

If a man forcibly compels a woman to marry him (which is a felony) she is a competent witness to prove the fact & for the same reason. for she is the object of his criminal conduct. Cro Car 488. Esp Dig 721, Bac. 286, Peake 174 1 Ph Ev. 67-8, 2 Hawk 608. This is not properly an exception to the gen. rule for in this case the woman is not the wife of the man. for there is no marriage in law, and it is said that she may be

introduced as a witness in his favour, and proves the marriage voluntary on his part. The thing is doubtful yet it is against the rule, for it is in result this. That the first proves having his wife and then the wife is testifying for the husband. 1 McC. & Al. 181. 15th Ed. 68.

"Fifth Exception" to the general rule is, If a man married having a lawful wife then living, the second wife may testify against him, for the second marriage is "de facto" and not "de jure". Bull 282. Esp Dig 721. Peake 174. 15th Ed. 68. 1 McC & Al 181. This is not exactly an exception to the general rule, for no contemplation of law, they are not husband & wife.

"Sixth Exception" to the general rule is, in an action between other parties the wife has been admitted to testify to facts which might indirectly or indirectly charge her husband "criminally" though in an action as A for the wedding portion of his wife. The wife mother was admitted to prove that her husband the bride's father, was to pay for them & that they were charged to him. 1 Stra 304. Bull 287. Esp Dig 721.

But she could not be permitted to prove that it was our the defr. but her husband who committed a certain act, for this indirectly criminates him. 1 McC & Al 161-2, 2 Ld. 268. Ld Ray 752. 13th. 443. Christian, note.

Nor can the husband or wife individually operate in his favour. Thus in an indictment as A, B, and C, the wife of A. cannot testify in favour of B or C. for this tends to lessen the number, and in any discharge the husband, and there must be two to support the crime of conspiracy. 5 Esp 107. Phil 65. 6. 1 McC & Al 162-3. 172-3. 2 Stra 1095. Peake 173.

Seventh Excep.n to the gen. rule. The accusation of the wife relative to business in her own province has been admitted to charge the husband with indelicacy. Thus her accusation that the had agreed to pay a third person to nurse for nursing her child was admitted to charge the husband Stra 504. 527, Bac 287. Esp Dig 721, Phil 71. It is to be observed that here the wife herself is not a witness, but it is her declarations out of court that appear against him. This truly an anomaly, wholly by itself having no analogous case in the Books. That such accusations may be admitted she must be treated in this case as an agent. But it goes far beyond the usual rule of evidence in admitting the declarations of an agent. For the rule is, that what an agent says at the time of discharging his agency and in relation to it is a part of the "res gestae" but what he says (in relation to) at any other period is no part of the "res gestae" and of course not within the rule but in this case the declaration tho made not at a subsequent time is admitted, notwithstanding it is no part of the "res gestae" Phil Ev 69. 1 Esp Ev 142, 2 Ev. 511 n. Starkie 396.

Eighth Excep.n to the gen. rule

In an indictment vs the husband for the murder of his wife, her dying declarations if made in contemplation of death, are admissible evidence against him. The same as if it had been of any other person and this ex. necessitate. 1 East P. C. 357.

Joinder of Husband and Wife in prosecuting and defending

In many cases relating to her person and property, i.e. when the cause of action relates to her person or property the husband must join, in others he cannot and in others he may or may not join at his election.

I will first premise that it is extremely difficult & I may say impossible to reconcile all the cases under this head

First, That they must Join,

It is a gen rule that (whatever) the right of action on the husd death would survive to the wife then she must join him in the action, hence she must join in all actions during coverture which after coverture she can prosecute alone. Wms 423-4. 3 Ch. 631. 1 Roll 347.

The reason of this rule is, that should the husband die she would out her of her right on his death for by commencing the action he would attach the right to himself and this tho he died pending the action for if he has a right to commence it he has a right to pursue it thro, all its stages, and if he dies his representatives will prosecute it for him. 1 Ambly 309.

In that the husd. he must be a party for various different reasons, during marriage and one more viz, the Court appoint an atty & tho'ch should have the sole right of prosecuting it would encourage very unwarrantable suits, as well as expose the husd. property

In actions real in her right they must join, for if he end recover alone he would consequently make the inheritance his own. 1 Bac 21. 1 Roll 347.

The rule appears the same in ejectments for as her term for years intitles to the reversion she has an equal claim with her husband to have his right of survivorship 1 Bac 21. or 121. Cro Jac 404 Cro E 133.

The rule is late to be the same when an action is brought on a chose in action which the husband before coverture. Indeed I had read this rule so often in the Books that I was surprised to find it considered by the recent authorities as a doubtful question.

In Support of this rule vide. 2 Ves 434. 1 Roll 347. Cro E 537. 3 Ch R. 631. 2 Atk 208. 2 Ves 676-7. Com Dig B & F. 2. Bac B & F. 16.

The authorities doubting it vide Cro E. 133. 3 Leo 403. 1 Ver 396. Cro Jac 219. 7 Ch R. 344. 10 Ves Jr. 578. If there is any thing in the principle of the gen rule they must be joined. For if the husband dies they survive to the wife.

The reason of the latter opinions are not land down but I conjecture it to be this, that they regard his rule action as a method of leading them to his prof. If this is not the reason there is none. They can support his every alone. But just a reason is in my opinion is absurd. for until the debt is collected it is not of all plain to say that it is received to his own.

To recover rents due the wife while sole they must both join at Com Law. But it is now not necessary since Stat 32 Hen 8. has given it to the husband absolutely in the interminency 1 Roll 347-8. 318. Cro E 700. Co Lit 35. b. Com Dig B & F. 2

For an injury to the wife during coverture both must

join for the sole reason that it survives then, as in ac. for Slander Battery &c. I now speak of a direct injury to the P. not of those by consequence, for then he has a separate action of his own. 2 Ld Ray 1208. 1 Brit. 328. Co Ent 501-38. 600 Com Dig. B & F. B.

The rule is the same in trespass on the lands of the wife even if it survives to her. Com Dig B & F. B, Wms 303.

I take the better opinion to be that the rule is the same in trespass for cutting timber during coverture on the wife's land. for they are a part of the realty. And the same reason appears here as in a real action. Moll 347-8. 2 Mod 424. Cro E 96. 1 Brit. 195. But this case is doubted and in Brit 195. it is doubted by the Chief Justice, also in Com Dig B & F. H there but authorities in Vent & Comyns, support that he may join or sever at his election but the cases which he cites does not warrant this doctrine, for one of them was an action for enclosures, and what was the cause of action in the other does not distinctly appear, but probably the same. But for actions for enclosures, he might in principle sue alone but according to the weight of authority he may join if he chooses. Then the principle of their joining does not apply. For the enclosures are the immediate rewards of his own industry and if he sues they go to his representatives & if he survives they are his own. The point in this case I think is open. See 2 Brit. 195. Com Dig B & F. H, a H. These authorities support that he may or may not join.

In trespass for injuries for goods coming on the wife's inheritance. They must join if coverture according to some authorities. But according to others.

they may or may not join. But I think the better opinion to be that they must, for it is not an emblement but of a permanent growth. In support, see Com Dig B S H 2. Bombelles 277. Cortin Lio E 26. 2 Berty 424.

In "Goods" for chattels of the wife, found before coverture and converted after, whether he may sue alone or must join her is a question on which the authorities are divided. I have already been down this end and expressed my opinion which is expressed in "that he must sue alone" Salk 114, join or not. Lev. 107, 1 Sid 102 & 2 Vent 261. In these three cases the Judges were equally divided. In 3 Wils. 631 Ld Kenyon suggests an opinion that he ought to join B & I think him to be incorrect.

Not cases done to the wife's person or property which sole they must join. On this there is no diversity of opinion 1 Ball. 147. 3. 3 Wil. 627. 1 Bac 306

Second

When he may or may not join her.

If he distrains for rent due before marriage and it is found it is all that he may prosecute alone his action. Lio E 457, Com Dig B S H 2 1 Bac 304. This is a collect case for he may sue alone regarding the tort in joining solely for the distress in law is accord, based in his sole person, or since it was his entire property and will revert to him, he may consider the means of prosecuting throughout as enforcing his right. But Jenn Stat 32 Hen 8. the law seems has ceased to operate.

In "debt or trover" for rents, arising out of the wife's lands during coverture, they may join, for it will revert to the wife. It seems to be regarded as a chattel interest. But it is a choose, and

for this I should think they should join. Farmer 692. 4 Co 57. Cro Eliz 162.

If a Bond is given to both during coverture all the Books agree that he may join a sever. 2 Mod 217. 230. 4 T.R. 616. 1 East 432-3. 2 Vern 676. 877. Dip Dig 296. 3 Bos & P. 267.

The principle of this rule is that as the Husband during coverture has a right to convert his wife's taking an interest under it or to depart to it, the modern doctrine is that (yes) the interest is "prima facie" his, but that it is in his power to admit her an interest by his consent, and proof of this consent lies on the wife. And if a Bond is given to both in right of the wife as Ex.ix he may sue alone or join her at his election but he is subject to account for it as to such assets and he may release in it as given to him without mentioning his wife, but on joint send. subject to account 4 T.R. 616. 1 Selw 309.

And if a Bond is given to the wife alone during coverture, the rule is the same. Nor will it survive to her. This is disputed. 3 Lev 413. 1 Vel 396. Com Dig B 2 & W. 2 Vern 676. 2 Mod 217. Why this distinction between a Bond given before and after coverture? It is that with former they must join because the debt is exclusively hers, But in the latter it is entirely his own if he elect. I mentioned in the last rule that it was disputed. That a Bond given to the W during coverture would not survive. Ld Hardwicke says neither equity nor law that it will survive to her. but this is overruled and is now held that it will not exclusively vest in him unless he expressly on intention that it shall not vest in his wife after his death, i.e. survive. 1 East 452 3 Bos 266.

The rule is the same if a Bond is given to during coverture and it runs exclusively in her and it

"prima facie" his wife's contrary opinion is expressed by him. 1 H. Blk. 18. 1 Atk. 174. 2 Roll. Abr. 134. Com. Dig. B. 1 H. 6. 30. 1 Atk. 458-9.

That the Legacy will not survive to him unless he survives. Wms. 5 Ves. 692. Roll. Abr. Grand Cases 284-8.

The rule is the same as to the wife's distribution share under the Stat. of Distributions, falling to her during coverture, and it not excluding, in the husband, unless he survives. Wms. 2 Com. Rep. 564.

As to Legacies: if the husband is obliged to resort to Chy. to obtain them, the Ct. will not decree only he makes a reasonable provision for the wife. 1 Atk. 491. 516. 2 Ch. 420. 5 Ves. 692. 2 Br. Chy. 583. Vib. 195. 565.

But until quite lately, it was not supposed, that Eqy. could interfere in favour of the wife in this case unless the husband was PLF. in the Court praying for the legacy and then only on the principle of rebutting his equity. But the Cts. now hold that if he has obtained the legacy without resorting to Chy., she may, by her next friend, support a Bill in Chy. for a suitable provision out of her legacy. And the rule is the same where the husband has obtained by similar means, her share which fell in under the Stat. of Dist. In this case she could by her "next friend" any. file a Bill in Chy. against the administrator together with her husband. This is a novel rule in Chy. and not a little singular. Fellen 4. 321. 490. 5 Ves. Jr. 737. 517. 2 Ch. 676. 10 Ch. 578.

If the is the mentorious cause of action and the express promise is made to her he may join her or not at his election. Here the cause of action will not survive to her yet as this is the meritorious cause of action. He may consent to her taking an Interest, as when the respondent certain effects for another woman who was

provided a compensation. Co Inc 77, 205. Com Dig Ba H. 3
Co C 61. 4 Mod 156. 2 Ver 424. Salk 114. It is said in the Ca. that
it would survive to her but it is a mistake and denied
by Ld Holt. Salk 114. Com Dig B. H. 3. Secondly even this has
to be joint he impliedly consents to her sharing in the
recovery. Hob R. 134. Co 6. 61.

When they join in "Assumpsit." The joint
interest must be distinctly alleged and substantially so. i.e.
the dec. must state the reason why the goods as with
alone example "That the wrong was performed by her" &
if this is omitted the dec will be bad. 2 Blk. R. 1256. & 1256.
Co Inc 642. 2 Ld R 405. Bac 55.

Thirdly. — Where the wife is the injuring person
of the action and the action is bar for consequential
damages. he must sue alone and can not join her for
the "tort" of the action is the consequential damages
to him as loss of service by reason of her battery. Hob 140.
1 Salk 206. Co Lit 3. Co Inc 501. 558.

This action of "for good consortium amisit"
has commonly been called "Trespass" instead of "Case" and
it trespass in form but "case" is the proper action and that
it should be so made. 2 Sh. 167. 5 Ch 136. 351. 3 Bels 317. Salkeld 32.
6 East. 387. Bott substantially "Trespass" is the ordinary
and approved action in Eng. 2 Bos & P. 476. Yet in this State
"Case" is the only action in such case. The Eng rule is
the mere consequence of precedent and at variance
with reason & principle. It originate in this State. for the Pltff
to set out his complaint, he has to allege the Battery
and say it was "force and arms" and this by way of
inducement and by the reason of this the action is
nominally lost in the form of Trespass. and this reason

pursued "Sub silentio" untill the custom became a rule of Law. —:-

If a Battery is committed on both husb & wife they cannot join in an action to both for the injury to her the husb. but for that to himself he must sue alone Ld Raym 355. 5 Mod 538. Yelv 89. Com Dig B & H. B. 9.

But should they join and separate damages be given for the injury to each the husb may release that to himself and take judgt jointly for the injury to his wife, for the action quoad the injury to the wife was rightly brot and had the Judgt been joint judgt could be arrested 1 Vent 328. Ld Raym 558. & 565. 2 Vent 29. Com Dig B & H. B.

If the jury find the defdt. not guilty as to the Battery of the husb. but guilty as to that of the wife the verdict will be good and they will take a joint judgt on the verdict upon the Defdt is found guilty as to that only, for which the could jointly sue. Yelv 166. 2 Vent 29. Ld Raym. 355.

If a promise is made to the husb. in consideration of forbearance to sue a demand due his wife when sole. If an action is brot on this promise he must sue it alone, for tho the debt was originally due to her. Yet in this case it is but the consideration of the promise not made to her but to her husb alone Salk 117. Carth 462.

I will observe that where he may sue alone they should be joined a joint when he should sue alone, the mistake or neglect is not cured by verdict and if judgt has been had thereon it may be reversed by writ of Error. 2 Bulst R 126. 1 Vent 328. Hetes 61. 229. Ld E. 153.

Still should they join in action for imprisonment and lay a "per quod" that his business was neglected

a verdict will and the declaration and the "per quod" will be considered as matter of aggravation. But it will be fatal on demurrer Salk 119, 6 Mod 127. This is an Exception to the rule above.

If the wife sues alone when she should be joined the Deft. must plead the non joinder in abatement, for the non joinder does not go to the merits but the form of the action merely. If it appears in the dec. it would abate. "de facto" 3 Lev. 627.

In such case her interest is not pleaded and judgt is given against her. She has priv with her husband to release it by writ of error, "coram nobis" or if not she may be liable on the case 1 Roll. Abr. 347 Com.

If they join in an action and the dec. sets forth no interest in the hsb. it will be ill on demurrer, certainly on Motion and if Motion in gen. nor demurrer 2 Wms 405, 407-8 n. Bac 33. 1 Lev 311. 312. But will be cured by Verdict. This is incorrectly stated Bac tar. 344.

Husband & Wife must or must not be joined as Defendants.

It is a general rule that when the cause of action will survive against the wife she must be joined with her husband as a joint-defendant. For if it survives be free against the husband alone, it implies a right to pursue the same strength against him and if he dies so his representatives. But this would be a contradiction to a positive rule of law, that the husband liability on his wife's account ceases with his life

and on his death of course his chattels cannot be liable, hence she must be joined with him. Hob 281. 440. 7 Ed. 4. 8. 3 Mod. 186. Co Lit. 351.

The rule is the same as to real actions but to recover from the wife land of which she had poss. at the time of marriage Co Lit 133, 351. Com Dig B & H 4

The same rule holds as to debts due from her while sole. (in contracts)

And the rule is general. That in all actions commenced against her during coverture for what she was liable before. The husband must be joined for all must recover against him. Co Lit 133. Com Dig. B & H 4

The rule is the same as to torts committed by her during coverture and without the joining a consent of the husband for she is deemed the guilty party alone. But had it been with his consent he, he would have been alone guilty and the action should be against him alone 1 Wms 149. 2 Show 1137. Co Lit 301. Com. Dig B & H 4.

If a lease is made to both husband and wife and action for rent accruing coverture, must the lease against both. For her purchases are only voidable in other words she is capable of taking a lease during coverture and of course of being bound by the covenants in the lease. Com Dig B & H 3. 1 Roll 348. Yet in this case the action will accrue against her unless the debt but this does not always as yet.

As a gen. rule. where the cause of action does not accrue against her. the husband must be joined —

If a feme sole lease marries. The husband must be sued alone for rent during coverture, for it survives against him and not against her. Roy 6. Com Dig Baf H.

Assumpsit against husband & wife in joint promises is bad. It must be against the husband alone, for the promise "quoad" the wife, void and to declare otherwise would be unlawyerlike i.e. to state the promise of the wife. Farrar 313. Com Dig Baf H. 4.

If they are sued for a tort committed jointly by them and the husband should be found not guilty the declaration will be found incurable and if judgt is given it will be arrested. Yelv 106. Com Dig Baf H. 4. 1 Burl 93. Cro Jac 203. There is no apparent inconsistency in this case and I doubt the correctness of it. For the reason that where there it should be no trespass.

In Trover against both, the conversion should be laid to "her" not to "them" nor for in judgt of law it could not be to her use, for she cannot hold to her use personal chattels. Nor will the verdict cure the acc. Cro Car 661. 1 Roll 6.

If she is improperly joined the misjoinder may be pleaded in abatement, and if it is not so pleaded, it is error and then may enter in arrest of judgt. Yelv 106. Com Dig Baf H. 3.

In an action on Bond for work, labor by him alone the misjoinder may be pleaded in abatement. 1 Burl. 93. 2 Bulst 227. 7 Mod 345. 1 Salk 313.

If a feme Covt is sued alone and obtain the fruit by pleading her coverture, she will have execution in her own name for her costs, and in her own name

and this must be for no other name can appear on the record. But the husd by joining his wife in a "scire facias" discovering the fact of their relation, can obtain execn in their joint names Doug 614.

A feme covert sued with her husd cannot plead without him for the might by her pleading injure him or his interest, Esp Dig 318. Co Ia 329.

She cannot in this case appoint an atty but the husd must appoint for both. But when she is sued alone, as her husd is no party I conclude she must plead alone for she can appoint no atty. But if her coverture does appear on the record I conceive that the court appoint an atty. Or if the Pltff has sued her as a feme sole he is estopped from averring her to be such and a court cannot forbid her from pleading solely, and her appointment of an atty must stand because he cannot object.

Celebration of Marriage.

In all Protestant Countries marriage is regarded as a civil contract. Salk 120. 437. 1 Blk. 433.

For the Eng. Stat. Law. vide, 1 Blk 433. 439. 440.

Publication of Banns, is required by the Eng. and our own Law.

The Consent of Parents or guardians is necessary when the parties are minors.

Our Law permits magistrates and settled clergymen to celebrate them within the County in which they live and tho, they celebrate mar

riage without this jurisdiction according to the constitution of our State the marriage is good but the magistrate or Clergyman is liable to a fine.

It has been the opinion of some, that marriage may be solemnized by any person, and even by the parties themselves. This opinion is taken from a prohibition of the K.B. to the ecclesiastical Court not to decree such a marriage in such a case, But in another like case the Lord was refused the administration of his wife's estate, but had the marriage been before he could not be prohibited for his claim is a mere "attractio juris" Salk 120. to the first case vide Salk 438.

But the law declares that just and just persons may solemnize marriage But it is perfectly manifest that it would declare such persons when the same rights before existed, it must so as to say that it should be lawful for a magistrate to purchase a horse. 1 Bl Rk 439. 435 n.3. Bro B & J. A.

When marriages are void "or voidable,"

The impediments to marriage are of two kinds canonical & civil. The former are derived from the code when they are found, and are of three kinds, Consanguinity, Affinity and Pinbecility, Therefore formerly existed but is now abolished, 1 Bl Rk 434-5.

These disabilities are derived from the Levitical Law, and are adopted into the Law of the Land by State

32 Hen. 8th prohibiting all marriages the degrees of consanguinity or affinity prohibited by the Levitical Law, Bac Abr H. d. 1 Blk. 435.

If a marriage is had against law it is void absolutely and can be avoided only during the joint lives, and if the Ecclesiastical Court attempts it after the decease of either or both, it will be prohibited by the Ch. of K. Bench, Salk 548. 1 Blk. 434. The reason is, that the divorce decreed in such cases by the Eccles. Court is intended solely as a spiritual discipline on the Offenders but after their death the divorce could not be granted because the reason has ceased, Salk 548.

All lineally related within the degrees of consanguinity & affinity as prescribed by the Levitical law are prohibited 3 Bac. 570. 1 Blk 435.

So are all collaterals within the third degree. ——

All related in the 4th degree civil law computation may marry. 1 Blk 435. 2 Ves 207, Cro E 228, Co Litt 235. Hob 101.

In the third degree there is an exception viz. A man may his wife's sister, but he cannot his brother's widow tho in the same degree, But this is limited in this State by a recent Statute. Salk 121. 548. 1 Blk 440. Co Litt 271.

Divorces in these cases are perpetual i.e. "a vinculo matrimonii" and the consequence is that it renders the children of such marriage illegitimate Salk 548. 4 Blk 64-5.

Our Act declares marriages against these rules null & void & even then is no need of a divorce indeed there is nothing on which it can act.

Civil Impediments.

1st Prior Existing marriage. 2d Want of proper age
3d Want of consent of Parents or Guardians.
4th Want of reason. All these render the marriage void ab initio. There is no need of a divorce, for there is no. thing on which the divorce can act. 1 Blk 435-6.

As to the third impediment the Stat 4 Geo. 4. has altered it —:-

A violation of the first is a felony by the Engl. Law, and highly penal in this country. Prior Blk 164. 1 Ch 436.

The Second impediment is not true in its full (extent) extent. For if such a marriage is had the parties on coming of full age may validly ratify another marriage. So that in this respect it is voidable only. 1 Blk 436. Co Lit 79.

When one is only a minor until the minor attains full age either can disaffirm but if the minor affirms when he comes of age both are bound. Co Lit 79. 1 Blk 436.

But contracts to marry at a future period are not binding unless they are of full age & even the adult is bound 1 Blk 436.

Want of reason, as this is an impediment to the validity of all contracts, it must be an impediment to marriage also, which is a contract, 1 Roll 357. 1 Blk 437.

Divorce.

Divorce is of two kinds "A vinculo matrimonii" and "A mensa et thoro" The first is a complete dissolution, the second the relation still exists, 1 Blk 440. n.

The causes of the divorce "a mensa et thoro" are adultery "personal cruelty, well grounded fear of injury". These for the former are granted in Ecclesiastical Courts. The Parliament at its discretion has a right to grant divorce. 1 Blk 441.

In this divorce the husband is allowed alimony i.e. his support. The payment of this the Ecclesiastical Court cannot enforce. But if the husband refuses to pay it a Ct of Law will compel him. 1 Blk 441. Ch 5.

But if the wife is divorced for an adulterous elopement she forfeits her alimony or the dower her dower, in such.

All children born after divorce a mensa et thoro" are presumed to be illegitimate. But this may be rebutted. Salk 123. 4 Ves. 356. Cooke 42 Esp Dig 384-5.

When one is born after voluntary separation it is presumed to be legitimate. but this may be rebutted but no more than it could be had they never separated. Salk 123. Esp Dig 484-5. Ves 925.

Divorces in this country are granted by the Ecclesiastical Courts. & are granted in this State for fraudulent contracts which amount to the 3d sentence decree. 2d Adultery, 3d three years neglect to do the duties of a husband. 4th Seven years absence, if women are divorced never contracted. The issue of such the disabilities do not exist at the time of marriage.

In Eng cases a total divorce then is not dower or alimony. 7 Co 70. 2 Blk 136-137. 5 Co 98 a 78.

Except in the case of an adulterous elopement the wife by a divorce "a mensa et thoro" does not forfeit her dower or alimony. But for this cause she could

Jeffers it was there no divorce. 4 Co 19. Co Lit 403. Co Lit 32-3. 8 P Wms 270.

But the rule is different in the case of a complete and final divorce for here there is none there grand.

She loses unless she is the guilty party even not loses her dower. But if she is, then her dower is barred.

Taken in the latter part of Jany. & first of Feby 1824.
Augt. 24th 1824.

Parent and Child
Guardian & Ward.

There are titles all distinct but they are so interwoven that I shall treat of them together and they will include all the laws of Infancy and of age, indeed the rights and privileges of infants constitute the chief (part) of the law under this title & I will premise, that an Infant or minor is any person male or female, under the age of 21 years. The statute has provided a popular error that a female is of age at eighteen Lev. Lec. 104, Lec 259, 1 Lev. 142.

Full age by the Eclaw and our own is completed on the day preceding the 21st anniversary of our birth and it is completed on the first moment of that day. For the law knows no fraction of a day. Hence if one is born on the last moment of the 1st day of Jany 1800. he is of full age on the first moment of the last day of December 1820. being of age 48 hours before the closing of 21 years Lord Ray 480. 1096, Pow. Con. D. 144. 686.

I shall first treat of the

Legal privileges and disabilities of Infants

1st 1st. Of their crimes. This has chiefly antiquated in the title of "Criminal Law" But it is a rule that no Infant under the age of seven years, is punishable for any crime for at this age the Com. Law does not attribute there mental

against i.e. "capax doli" and this presumption can never be rebutted. At the age of 14 they are punishable capitally so far as legal discretion is required 4 Bl 20. 3 Inst 464 1 Hawk 1. Infants between 7 & 14 are punishable at the Common Law if they are "doli capaces" But the onus probandi is on the prosecutor. There was once a distinction taken and held. That the presumption of Law was for the Prisr for the first half of the time between 7 & 14, and against him the latter half 1 But this is now exploded. 1 Hawk 14. & 41. 4 Bl 23. 1 Inst 464.

In some cases infants above fourteen are excused so far as regards mere misdemeanors & offences not capital and on this point I find no rule of discrimination in the Books. I find no examples of their exception except in cases of conspiracy for the Law imputes no neglect to Infants presuming them to have no forethought but for those of conspiracy I think they are on a footing as if they were adults. 1 Hale Pl. Cr. 20. 22. 4 Bl. 22.

I find laid down as a rule that an infant will not be permitted to convict himself by confession in Court without great caution being used by the Judges on whose discretion the admission of such evidence depends, and it is not unfrequent for the Court to order the plea of Not Guilty to be entered notwithstanding the confession of the infant. Ld Raym 466. Foster 70.

Again, that inflicting corporeal punishment extends in some cases to Prisrs tho they are not named but not in all cases. And this is the rule of discrimination. If an offence created by Stat. is made out a crime as it is at Com. Law punishable corporally Infants are included tho not named at the age of 14, for at this age they

are liable to corporal punishment. But if the State Law creates a crime without denominating it an Offence at Law punishable corporally. Infants are not liable, which expressly proved, Co Litt 247, 357, 1 Hawk. 24. 2 Bac Ab. 27. Raw 344. It would be difficult to assign a satisfactory reason for this distinction, it is unquestionably in fact arbitrary.

2d Then Torts,

For torts or wrongs connected with fraud an infant is liable civilitor and this at any age. For in civil wrongs the intent is not regarded in the question of guilt or not guilty, but in the question of damages the intent is admitted. 1 Bouldy 81. 2 Roll 567, 1 Hawk. 3.

But as to cases of tort where malice is necessary the Books do not furnish any decisive rules. In Roy 129. It is held that an infant at the age of 17, does kill, in Slander. From this the presumption contrary has been drawn that they are not liable, if under that age, in the action. I think that the same rule that applies in other cases applies here, and that an Infant at 14 would be liable in Slander. For the civil Law has determined that he is at all of, or else at that age. 129, 3 Bm 732, 1 Ca

It is laid down that an infant is not liable in Slander, But at the age of 14 he is liable for a tort, 1 Ld 129, 258. 1 Lev 169, 1 Keb 778, 905, 913, 1 Saunders 7. In Kitchin it is laid down as well that an Infant is liable in such torts as are committed with force as Trespass, Battery, false Imprisonment &c. But not in Slander, malicious prosecution &c. But this is strongly disapproved of by La Mansfield and then by La Kenyon. Who both held that they were liable civilitor for fraud. These opinions are extra judicial. La Kenyon held that in c.

this rendering his contract on Inft would be liable absolutely
B & Bass 1802 Cooke R 223. There is an uncertainty existing
on this question of tort not yet able find on this point giving opinion that an Infant is liable civiliter for fraud or
deceit if "able capax." as in crimes unless the judgment
Dom. Rel. 262-9. being for the infantile fraud would subject him on a
contract not binding on him or unless the fraud is a breach
of his contract, for otherwise the one would have been to shift
the form of the action and an infant would always be
liable after a breach of contract. For Ex. An Infant borrows
money of B. and was bound at the time to say that he should
avail himself of Infancy to avoid payment, this is fraud
but if he would be subjected in this fraud he would virtually
be subjected on his contract, upon his borrowing money and
stating that he is of full age, here he cannot be subjected for
his fraud for if so it would be subjecting him on his contract
" But in Slander I deem him to be liable. And
further it has been decided that an action sounding in
tort against an infant arising "on contracts" cannot be supported. As if a Bailee a horse to B. & B rides him beyond
the proper distance. A cannot recover of him in tort, for
this is in virtue subjecting the Infant on the contract under
in the treatment, 8 J.R. 335. 1 Lev. 169, 1 Sid 129. 1 Keb 905, 913.

According to this an infant bailee
is not liable for breach of trust, But there is a decision
in 8 Conch 36. in opposition to it. also 1 of Penn Cases in 1
Esp R. 172 supporting the same, but this Penn case
must be considered as overruled by the case in 8 J.R. which
occurred sometime after it. I fully accord with the decision in 8 J.R. This is the best explanation I am able
to give of an Infants liability. But there are instances,

in which Ch. will decree a contract to be good against an Infant to prevent fraud. In this class of cases there is no particular rule, but the principle is this. That as the Chancellor is representative of the King, is guardian, par-ammount, this interposition being discretionary so far as he can enforce the contract, so as to prevent fraud on the one hand and not impair the rights of the Infant on the other, he will interpose. 1 Ambly 70 n. 9 Ellwd 38. 2 Cy Cas 489. 1 Br. Ch. 353. 358.

Ch. interposes only when the contract is voidable for if it is void should the Court make a decree it would make a contract for the parties for when the contract is void neither of the parties can be bound. 1 Ambly 71. 1 Ve. 13 Ath 75.

Third. Infants privileges and disabilities in Contracts.

It is a gen rule of the Com Law, that no one under the age of 21 years can bind himself by contract, and their contracts in general are either void or voidable.

They are in gen void but this being invalid does not determine whether they are void or voidable, and what are the one & the other in every case, has been a great question. 1 Ath 465.

First whether valid or invalid.

"If an Infant and an adult join on the one side with another in a contract, the adult is bound and the Infant not. Day 500. 8 Ellwd 190.

If the Infant join in a single Bill it being a Threadstick voidable, I suppose they are sued upon it and the infant proceeds on his plea of privilege, but

the Pltff prevail in this action as the adult, or must he bring a new action in his sole name? The weight of Eng. Authority is that he must bring a new action 3 East 75, 5 Co 47, 1 Ld Ray 32.

This is not satisfactory to me, for the bill is not void. I conceive that the Pltff cannot bring his action against the adult alone because he is in this predicament. If he joins them he is defeated for the misjoinder and if he sues the adult alone the plea of misjoinder is fatal to him. But had the bill been strictly void quoad the Infant the Pltff could have declared upon it as the sole bill of the adult. The Eng. rule is denied in 3 Johns R. 160, & there held that the Pltff, on the pleading plead by the infant, might recover against the adult in the same action.

It is a gen. rule that if an adult contract with an Infant he is bound and the Infant is not, for the privilege of the latter is not in common with theirs. and it is no plea for him to say that the infant is not bound. 1 Roll R 38. 1 Ld Ray 35. 3 Co 2 48. Ld Cam 502, 2 Stra 937. The same rule holds in Equity. But if the Infant files a Bill for the fulfilment of the contract the Ct will not decree unless the infant performs his part which could not be exacted at Law. 1 Ros. 39. 40. But this rule does not hold quoad the Infant when the contract is absolutely void but only when it is good or voidable merely. Stra 938 1 Ros 39. The reason of this is obvious for as to the latter there is sufficient consideration moving to the adult, but when the bond is void there can be no consideration support the adult should agree to pay the Infant at $500 in consideration of a power of atty. given to him by ct. to dispose of his ct. estate and to convert the avails to his own benefit, he is not bound by his promise, for there is no consideration moving to him, the power of atty being totally void.

" If in a contract the Infant receives, the consideration and then avoids the contract by plea of infancy he is not bound to refund the consideration money for if so it would be an indirect way for him to charge his estate. 1 Sid 128. 1 Lev 169. 1 Keb. 905-13. I should suppose that if the consideration remained specifically in his hands, that it would be a case in which Equity would compel him to refund for it would not be endangering his estate, But if he had squandered it no Court would compel a restitution

To the gen. rule there is an Exception. viz Contracts for necessaries. What shall constitute necessaries the law has expressly pointed out. They consist in, food, apparel, lodging, medicine, and Instruction, no other articles by the law are deemed necessaries and on this the law is exceedingly strict. — By "instruction" is not meant necessarily a liberal or school education but instruction in a valuable trade 1 Pow. 34-5. 1 Bl. 466. 8 T.R. 578. Ld Dar 444. Ld Lut 192.

To subject the infant in this case the articles must be necessary at the time of the purchase. Neither can he bind himself for more than is necessary at the time nor can he keep a physician and pay when he has no need of him. Ld Dar 560 Str. 1171. Co. E. 583.

What description of things are necessaries is a question of law. but whether any of such articles are conveniences are in a given case necessary is a question of fact Com Dig 162, Stra 1101. 8 T.R. 578. Co. E. 583. Ld Dar 500 1 Vent 88. Therefore if the arst plead that was a good contract "necessaries" is sufficient and it is not necessary to plead it, the reals he it is matter of fact. Ld Ra 110-11. 4 Bac 117.

On the same principle an infant can find himself for necessaries for his wife for the charge of her support

is a consequence of matrimony and as he was able to contract in marriage and bind himself in this, what is the principle so also must he be able to bind himself in the incidents thereto Stra 1081 Esh Dig 161.

On the same principle an infant husband can bind himself for necessaries supplied to his children Esh Dig 161.

So also he is liable for his father's debts contracted before marriage, for the debts are good and must be so against him, since the bride is not liable

But if an Infant is under the care of a guardian or parent and is duly provided for he cannot bind himself even for necessaries this applies to unmarried infants 2 Blk R. 3125 or 31.25. Peake R. 229. The reason of this is obvious for he is never supposed to bind himself only upon principles of necessity and as La Faudrike says only that he may not suffer for the want of them 2 Blk 35.

An Infants liability in such cases is coextensive only with his necessity and this necessity lies only in three cases.

" " First. When he has no parent nor guardian
" " Second. Where having them he is out of their reach
" " Third If being within their reach he is unprovided for but permits to suffer.

In the second rule or instance, it means the parents are also bound for parents are bound to maintain their children & I conceive the reason of the infants liability (I conceive) to be not on the ground of the infants (liability) parents being disclaimed but that he may be enabled to claim himself 1 Blk 440.

In strictness an infant is not bound by his

express contracts even for necessaries. He is bound to pay their true value ascertained by a Jury notwithstanding his contract might have been for more hence his obligations are grounded on an implied contract, Co E 583, Latch 169, Co Rep. 360 Palm. 151.

But tho he may bind himself for necessaries by contract yet he cannot bind himself by all kinds of written contracts; with respect to this there are five rules, viz. rules.

I. He cannot bind himself in a penal bond Co E. 920 1 Roll. E. 54 Bep Dig 164.

II. He may bind himself by single bill. A single bill is a bond or obligation without a penalty Co E 920, 1 Roll 95, Tho 939. 1 Lev 86, Chitty B. 20.

III. He is not bound by a negotiable note when negotiated 1 Saund. 73, 1 Ld. 41

IV. By a note not negotiable he may bind himself and the same rule as to negotiable notes till negotiated 1 Roll 403 n, Latch 160, 1 Saulty 73, 1 Roll 345, Ch. B. 20.

V. He is not bound by a Bill of Exchg when negotiated i.e. the indorsee cannot recover against him, But in favour of the original payee he is bound. Latch 160 1 Saund 73. Ch B. 20. 28.

VI. He is not bound on an account stated Latch 169. 1 T. R 40. Roll 87, Co Lit 172.

The rules applicable to all these cases are not all entirely clear tho, to most of them there are abundantly so. on this head I take this to be the true distinction viz. If the instrument is such as leaves the consideration open to an examination. so that it may be ascertained whether it is for necessaries or not, he will be bound. But if the nature of the security is such as relieves all enquiry into the consideration he cannot be bound by the security tho in point of fact it was even for necessaries. To apply this principle to the above rules

and first to the 1st. A penal bond from its nature does not admit of an enquiry into its consideration, here he cannot be bound. The Gen. reason assigned is that a penalty cannot be attached to infants debt is, to their disadvantage, but this is not sufficient comprehensive for if it is true in their words there is no reason that can support the subsequent distinction when there is no penalty, Co Lit 172. a. Co 6 920. 1 Hob 73. But the true reason is that the consideration of a penal Bond cannot be enquired into unless to their prejudice. 1 Cowp 30 a 136 Ch. R. 20. 21.

IIIrd "Single Bills" what is the reason here? for the consideration it is said in this case is not examinable at this day, But it was examinable once it is said & when the law was founded and was in force, tho the reason has ceased. 1 Hob 382. Mo. 423, 1 Lev 86. Ch. R. 20.

A single Bill is now treated with as much solemnity as a bond between parties. But as an infant cannot bind himself by it how can he be excluded from an enquiry into the consideration. According to one of the cases in Hobbs. when an infant was sued on a single Bill and he pleaded "infancy" the Pltff replied "necessaries" The Court permitted the Deft to traverse it. this methods decided that the question of necessaries was open to examination proof. and I conclude this to be the rule of Law. and if it turns out to be given for necessaries he will be bound.

IVth "Note Negotiable and not negotiable" Here he may be bound for it is a clear rule of law that the consideration of a note not negotiable may be enquired into and the rule is, the form of a negotiable note not (enquiring into) negotiable, And as the presumption may deny the consideration "a fortiori" may he deny it to have been for necessaries, But when

a note is once negotiated. The rule is that the consideration cannot be enquired into. This depends on the law merchant, hence it is that he cannot be subjected in an action by the endorsee, being precluded from enquiring into the consideration Rai B. 155. 1 Saulk 73. 1 Ros 634-5, 641. 1 Wood & Mod. 43. Ch B. 92 Sk 71. 41. 13 Mk 445 Doug 616. 10 Johns 33. 1 Cowen 553.

V^th. The Law on Bills of Ex stand on the same footing as promissory notes in this respect.

VIth. "Account Stated" It seems that when this rule was established that the amount was not supposed to be enquired into But at this day a mistake may be rectified Lates 169. 1 Sk 402. Nov 87. 1 Saulk 73. Ch Ca 602. Ros 26.

Mr Powell observes that in stretching the action is best only as the statement of the account itself This is an addition of the old case but it is settled that at this day that a mistake may be rectified and of course enquired into.

In the case of a penal Bond has the obligee no remedy against the Infant. Since the infant liable on the original contract for goods sold and delivered? This depends on another question whether the bond is a merger of the original debt, and this again depends whether the bond is void, or not so but absolutely void. if it is void able it is a merger, but if void it is not. and the obligee may waive the bond and sustain a suit on the original contract. Whether it is void or not is a question not settled But the law on this subject will be given in full in its proper place 3 Bur 1878. 1 Ver Bk 462.

On the other hand it is clear that a single Bill does not merge the debt. for being void only it is accord good till avoid by due course of law, and this if suit for purchaser will stand good. but if not it will

be avoided. Esp Dig 164. 1 Bac Ab. 115. 1 Roll 28.

" For money borrowed an Infant is never liable in any way either at Law or Equity unless it was actually expended for necessaries, at Law he is not bound unless the lender himself purchased the necessaries for the Infant and when he recovers of the Debt it is (text) for goods sold, as money lent. But if it lent money to B. an Infant and B expended it in necessaries. A could not recover it of him at Law. the reason here is the same as in the case of a feme covert expending borrowed money in the like way for the contract was void in its inception & cannot be rendered valid by any subsequent act. To bind in Law it must be good ab initio. Salk 279. 386. 10 Mod 67. 5 Ub 368. 1 Roll 37.

Hence an Infant is never liable for money lent in Law as money lent. and when the lender himself purchases the goods i.e. necessaries. The infant is rendered actually liable thereon for them, the lender is considered not as lender but as a vendor. and he cannot recover of the Infant more than the value of the goods, that is the vendor might have paid for them - notwithstanding.

But in Equity the rule is different. and if the Infant expend it in necessaries, Equity will consider the lender in the place of the vendor of the goods and he may recover of the Infant but only to the amount of the goods 1 P. Wms 558. 588. 1 Eq Ca 516. 1 Ro 37.

Then Euler relates to the modes in which an Infant may bind himself for necessaries a may not. It states in the law. that for nothing else can he bind himself. Even a contract for artificer to procure his trade are not binding though they afford an indirect way of supplies. They are not actually necessaries which arises the contract for the law will not admit the Infant to run this discretion. 1 Roll E 36. Co Ca 496. Salk 279. Str 1083 -

An Infant is not bound in a contract to pay for repairs to his own house, for he is supposed to have a guardian and if he has none it is the duty of the proper authority to appoint one, who is bound to pay charges 3 Salk 196 1 Dow. 36

But it is held that if one in fact takes the lease of a house and remains in possession until the rent day he is bound to pay the rent provided it is a reasonable rent, & holds in debt lies Dar 320, 1 Ros 35, 2 Bald 69. Perhaps the reason of this rule is that it is regarded as a purchase of lodgings but the rule goes further and says that if he remains in possession till rent day or a lease of land taken he is also liable for the rents if it is reasonable rent. what is the principle of this, is not to be found.

He can bind himself for necessary instruction But it is said he cannot for music & dancing But I should think that Infants in the fashionable part of community at this day may bind themselves as to the latter, as it is deemed a necessary part of an accomplished education.

In the rule notwithstanding if an Infant voluntarily does what he might be compelled to do by any Court of law he is bound by his acts. Thus if two joint tenants one of whom is an infant, make partition the Infant is bound unless he can interpose it for fraud or inequality. So he could be compelled to divide by writ of partition.

So if a term is bequeathed to him and he pays the rent he is bound. for he could be compelled to pay the rent. as the term is cast upon him by operation of law and is supposed to be for his advantage, death is his on

interest involved in the acquisition. 3 Bro 1812. 2 id 584. 10 Ath 16. 575. 9 Co 85.

If an infant mortgagee on mortgage debt being paid releases the release is void for he might be compelled to do this in Equity 3 Bro 1794 Ewin 15

This class of cases in which an infant does that which he could be compelled to do, is the only class in which he can bind himself at Law except those for necessaries. The case of a lease of land is an anomaly and a singular case by itself.

In Chancery

An Infant deft in Ch. is bound by the decree except that he has six months after coming of age to impeach it if he can, for fraud & error. But it is not to be inferred that he can set it aside of course 2 Ro 342 427. 1 id 295. 9 Mod 128. 1 P Wms 504. 2 id 401. 3 id 352. 1 Hately 75-6.

An Infant Plff in Ch. is as much bound by a decree as an adult unless he can show fraud or gross neglect in his prosecution by which the bill was prosecuted 3 Ath 626. 1 Hately 75.

An Infant may execute a power and bind himself in all such acts as do not bind his interest but take effect from such authority as he is entitled to exercise. Thus an Infant Exec. pays as Exec. a just debt he is bound by the payment. If he receives payment of a debt the debt is discharged and if he discharges the discharge is good Ofri of Ex 215-17.

So also all his acts in the discharge of an Office are binding 3 Bro 1802 405 id 357. Ofri of Ex 215-17-18. Com Dig Ord. E. This is no exception or qualification of the general rule as it does not affect his interests. But now in Eng. an Inft. is forbidden by Stat Geo 3 to act as Exec. so there now in Eng. he cannot

pay & discharge debts in that capacity.

Notwithstanding the gen. rule. If an infant makes a contract not for necessaries But after attaining full age promises to perform the contract. he is bound.

This rule holds of all void-able contracts. for they are capable of confirmation. But it does not hold of those absolutely void for they are incapable of ratification. 7.R. 756. 1 Str. 690. 2 Bent 203. Esp. Dig 163 1 7.R. 648.

And if Infants give written securities to perform a contract notwithstanding the security may be void yet a promise to perform after attaining full age will bind him. But the promise at full age is the ground of the action and the original parol contract the consideration of the promise and the action must be brought on the promise, to recover the original debt and not on the security. for that is void. The promise has no relation to the security, but to the original parol contract.

But when the contract is void ab initio only the consequence. for in such case the original contract or agreement is merged in the written agreement. E.g. An Infant purchases an equipage agreeing to give $1000. The parties so plain that it need no example. 7.R. Bul 155. Esp. Dig 164. 3 Bac. 134.

When the original security is void ab initio only the action cannot be brought upon the promise. for the security has merged the original parol agreement. or rather the original consideration.

But if on attaining full age he makes a new promise in consideration of a contract made during minority he is bound only to the extent of the new promise. As if an Infant makes a void ab initio contract and gives a single Bill for $1000. and after full age promises to pay $500. he is bound only as to the $500 he waives to sue and so much of his privilege Bul 155. Esp. Dig 164.

If the Pltff replies to this plea of minority a promise after full age. The replication is supported so far as he is bound by proving the subsequent promise and his avoidance thereunder his replication that the deft was of full age at the time of that alleged promise but as to this the court persuaded his counsel the deft. and after a subsequent promise proved it will be taken for granted to have been made of full age provided the deft proves the contrary. 1 Ld. Ray. 648 Bac. Dig. 164. The reason of this is that the Pltff is not presumed to be able to ascertain his true age whilst the fact being within the knowledge of the deft.

If an Infant is sued and arrested on an action to which infancy is a defence. This is not sufficient cause for motion to discharge him, as contrary is when a Stone Cut is issued. But he is left to make his plea and the reason of this distinction is that an Infant is liable to arrest and imprisonment. 1 B & P. 480.

Miscellaneous Rules.

Then are certain miscellaneous rules which I will here insert.

Infants at different ages are competent for different purposes. In choosing Guardians they are competent at the age of 14 at this age they are deemed to have sufficient discretion for this purpose. 1 B & P. 463.

But it will be proved hereafter that 14 is not the fixed age is law for this purpose.

An Infant may be an Exec. at any age but cannot act as such till seventeen. By the Com. law he may be an Executor so far as to enjoy all the rights of the office at any age. But cannot act in person. till 17. and under 17 acts at that age, an admr. is appointed. durante minore

mandatum cum testamento annexo." 5 Co 29. Off of Ex 307. Hob 250 Salk. 39. Cartt 466-7. This rule is now altered by Stat Geo 3d. 38. by which the infant is failed to act in his own life 21. But this Stat is of no force here Jd Ex. 30. 100. 1. 355.

But at Com Law he cannot be an administrator under 21. for by the Com Law an admr is bound to give bond for the faithful discharge of his trust but an infant cannot give bond. But in Eq he is not compelled to give bond when an Executor. Tho if it should be deemed expedient Equity would compel him to give security. The reason of this distinction is that an admr is appointed by law, and the law will take care that the assets be not expended. But an Executor is appointed by his Testator and it is presumed he has sufficient confidence in him, so much, so that the law will not doubt it so far as to make him give bond 5 Co 29. 5 Mod 395. Cartt 466-7. Comb 475.

The required age for consent in marriage is in males 14. and in females. 12. But if one only is under age each has the liberty of dissenting until the one under age has attained full age. and assents either expressly or impliedly Co Lit 79. Stra 937. 1 Bl R. 436.

It is said that a female may be betrothed at the age of 7. but I do not see the particular reason of fixing on this age. for she is not bound certainly. She may be endowed at Nine. Lit Sec. 36. 2 Bl R. 131. Id 463.

An Infant male at 14 and female at 12 can dispose of their personalty by will according to the opinions of some. the age is 15. 17 Ve. But I think the rule to be different for it agrees with the Com Law. Co Lit. 89. 2 Ver 184. 2 Mod 318. Prec Ch. 316. 1 Bl R 463. 2 Id 497.

This rule is prima facie law here, when there is no statute or fixed custom to the contrary. One State in this State fixed upon the age of Fourteen in both sexes.

Of Void and voidable contracts

This sounds so much like a verbal distinction that it does not attract much attention. But the distinction is of great practical importance.

Contracts which are not valid are either void or voidable, and generally speaking the contracts of infants which for necessaries are void or voidable because in gen. they are not valid

Courts of late seem inclined to render all their contracts voidable so far as they can consistently with the established rules of law. For it is certainly an advantage to the children as to have them absolutely void for their benefit either by the one or the other party he chooses and if it is void the other party is bound if the infant chooses to abide by it, which often times may be of no small importance to him. But if it is void neither party is bound Stat 938. 1 Bow 566, 3 d 1865.

Under this head there are two rules of discrimination laid down and first those contracts in which there is benefit or semblance of benefit resulting to the infant are voidable only. But those from which results no real benefit or semblance of benefit are absolutely void. Now all the cases relative to the first branch can perhaps be reconciled but we all find the last branch of the rule not to hold universally. Nor indeed we have found it to be nothing but a question of the other in law Cow 502. 8 Ill. 360. 1 Wm. 33, 38. 54. 2 Bl. R. 511. Mr Power adopts this rule in full.

The purchase of an infant is voidable because it is apparently beneficial but I cannot know why this reason should be taken as satisfactory but it will accommodate itself to the first branch of the rule Co Lit 2 a 8. Co Jac 320. 2 Vent 203.

Also a power of Atty to accept rent is void but a power to give livery of seisin is void 1 Roll 730. 3 Burr 1808 For another case illustrating this rule 2 Ven 314 511.

Under the latter branch it has been said that a lease by an infant not reserving rent or reserving a very small one when compared with the true value of the land is void such a rule as this must be very vague and uncertain for what the true value of the land is is a fact or question for the Court or jury and then the question is whether the rent reserved is clearly a disadvantageous one or not. In support of the rule vide Hob 130. 2 Butler 102. 10 Mod 421. 424. 436. 533. 12 id 162. 2 Lord 216. This principle has been strongly said by Lord Mansfield round. who after that the point was never decided and for authorities against the rule vide Lev. Ler. 547. Co Lit 306 a. 1 Le 6. 5 Bac 535. 3 id 304. Then taking the lease under these circumstances considering Lord Mansfield has given the true principles. was in Ejectment for trying title which is constantly in use. and when an Ind. is off. The lease is not questioned and it is always made matters recovering land. But if the lease was to be void the tenant could not in this way try his title. Another reason against the rule is that the lessee can never avoid a lease on account of the lessee's infancy i.e. he cannot refuse to pay rent or to perform the covenants all which he could do were the lease void Bac 1794. 806. 1 Ch. 161. There is another argument which has not occurred. viz. That an infant cannot

avoid his legal under the plea "non est factum." But as a general rule, when the instrument is void the plea is good. This is not I say a conclusive reason for he cannot plead nul plea to a bond. Tho it is void but must plead his infancy specially 10 Co 43. 5 id 119. Ro R. 857.

I think we may put labels on the conclusion that a deed by an infant is void all only. But if the rule of discrimination begins had is correct. how can this be interpreted void all for in that case was a lease or a sentence of lease arise from it

Again it would seem according to the opinions of some that all contracts by infants are void except those for necessaries, and that his promises are void. But if a Bill of Ex is endorsed by an infant the endorsee could recover of all prior parties as well as of the drawer but not of the infant. and why can the infant's endorser recover surely not unless he had an interest in the Bill. But how can he by the endorsement have an interest if the endorsement was void. this is conclusive that the endorsement was void all only. 4 Esp 487. Peake B. 132 for it conveys an interest. and must regard to the rule which covers his accountry contracts in general. 1 Ro 54. Ro R 920. Esp Dig 164. 5 Bur and Swinburn 334

But a penal Bond is absolutely void this I take altogether to depend upon dicta. I have read a judicial decision settling the point, but there are respectable opinions against it. 5 Bur 1545. Perkins S. 12. 154. Lit Sec 257. Co Lit 172. Let us test this on principle. An infant cannot defeat a penal bond by the plea "non est factum" he must plead his infancy specially Salk 279 & 279. 5 Co 119. La Ray 315. 2 H Blk. 515. Dr on Bon. 1. 9. 2 Ld Ray. 1 But if a penal bond

gives a penal Bond the may plead "non est factum" upon this authority in cases so analogous strongly supports it to be voidable,

But there are a class of cases in Chancery which all go on the supposition that a penal bond is void. Where an Infant gives a penal bond and bequeathes his property for the payment of debts of his. Eq^y will order payment of the bond provided it was not delivered fraudulently. This strongly implies it to be voidable only. for if it was void the Court would be making a new contract for the parties for being void it is a legal nullity 1 Eq^y Cas 282-; 1 Wood 403. 1 Fully 76. 1 Vw 87.

Hence to me a penal Bond appears to be voidable merely and besides the infants interest is equally as secure when it is voidable as when void But on this question of the Bond the authorities are balanced.

The second branch of the first rule of discrimination I have said is a gen. rule cannot be correct but that it was a general rule of the Second which I shall now name This second branch would seem to embrace sales leases &c but they are clearly voidable

Rule Second

All gifts, grants, leases, secd. obligations of all kinds, made by an infant and which take effect by delivery are only void able. But if they do not take effect by delivery they are void This I think to be the true criterion with an exception furnished by the last clause of the first rule Perk. Sec 12. 3 Bur 1804-5 Lit. Leo. 259. Latch 10. 5 Bur 2.i. void & voidable 535.

Every Book agrees that a bequest of an Infant

is only void able & why? For it is a transfer of real property and over which the Law watches with a scrutinous eye. But it is answered by the supporters of the first case that it is so solemn an act. But is his going into the land and delivering more solemn than executing a deed? This is not the true reason. But the true reason that it is a general conveyance of land which take effect by delivery 3 Burr 1804-5. Peck Sec. 269. Ab 125. 8 ib 42. Cowtit 247. 980. 1 Molly 74. 1 Mod 25.

It cannot be pretended that a purchaser is in his temporal a apparently so, for the consideration is not in question. Hence it cannot be treated a contract for his benefit and I know of no contract of his which can be called so, except his purchase.

If an Infant sells a horse to B and immediately delivers him the contract is void able only. But if he agreed that B. should take him in a week and B. accordingly came and took him. the contract would be void Peck Sec. 12. 19. 1 Mod 87. Feb. 77. Lutch 10. 1 Hobb 478. In this case B's subsequent taking should be a purchase, because the contract is void on account passing at the time of the contract. Let us that the void able contract with B. is void now would it not be of all things the most inconsistent that the infant the moment he had delivered the horse to B. of his own accord and B had led him off, for the infant I say to treat him as a purchaser. But this he could do was the contract void. Not being void able he cannot do so, but after rescinding the contract may recover of B. in an action. and indeed in this case B is entitled to notice before he is proceed against,

But the words "take effect by delivery" are not considered as passports by mere delivery, that apply to deeds and the like and these are void a voidable as they conform to the rule.

The deed of an infant which take effect by delivery are only voidable and this is the distinction. That which conveys an interest on delivery is said to take effect by delivery. But that which only delegates a power does not take effect by delivery the former is void and the latter void 3 Bac 1804-5.

It follows that an infants grants, conveyances, and all deeds in general are only voidable for they take effect by delivery. hence a penal bond is voidable and every one under this head contradicts the position that it is void.

And it may be established as a rule that all deeds in gen. which convey an interest of any kind are voidable as his covenants, bonds promissory notes Bills of Exchange &c, a present in trust paper. Perk Sec. 12, 5 Co 119. Litt Sec. 259, 8 Co 42-6. 3 Bac 1804.

There is another class of cases which belong under the title of "deed" which is illustrative here. It is a rule that if an infant delivers a deed and at full age redelivers it. the second delivery, as delivery is void it has its one and will have its relation back and confer property in the first. and the reason why the second is void is that the first is voidable only, and on this all the authorities agree. But the deed of a feme covert, redelivered after coverture, takes effect from redelivery but not from the first delivery because the first was utterly void and this instance demonstrates that infants deeds are only voidable Shepherd 60. Perkins S. 154. 5. Co Lit 119a 117.

But a power of atty. except when it is to execute evidence of some right in the infant's behalf is void for it conveys no interest 3 Bur 1804-8. 2 Rol 2 Ab 130. 1 Bl R. 577-8. 1 Ch Ca 75

Hence results this important practical difference. If an Infant makes a deed of conveyance and delivers it to the Party pos. the party in pos. may hold against the infant heirs But if he had given a power of atty to J.S. to convey to B. & he does so the infant sues trust B as a trespasser, 3 Bur 1808. 1 Bla.

But Mr Powell denies this distinction i.e. that there is any difference between a deed taking effect on delivery and one that does not. I know of no reason that would have induced him to have adopted the old rule except to oppose Ld Mansfield whom therefore he seems at all times ready to question 1 Pow C. 32-3.

The result of this distinction is that not only fine deeds, but leases, conveyances and deeds of all kinds are voidable only when they take effect by delivery but void when they do not.

But there may be exceptt cases, which require a modification of the rule, and is expressly by Ld Mansfield thus. If in a given case it should appear that the privilege of infancy would not be sufficiently regarded by construing it voidable it should be construed void. The rule with this modification is a true one, 3 Burrow 1807-8. 1 Bla. R. 579. 3 Bur 139.

The instances in which this modification will be required will seldom occur. Indeed I have read and can recollect of but one case of the kind C.J. A. has demised applied to an infant, applied to an hfs, & he had an extraordinary hand of heir. Upon return it

and made for money, and to get rent & profit. The defendants counsel supposing that she would have sufficient left. But to obtain the quantity he & his children have had. This was a clear imposition but it was a contract coming under the fair bargain of the 2d sale, now if this is treated as void all the infant could only recover back her land & its value, but neither the land nor its value would be any compensation. Then the privilege of infancy could be claimed for it was owing to her want of discretion that she was enabled to be imposed upon. But if the contract is treated as void the case stands upon, and she recovers damages, and she is entitled to be restored back. Hervey "v. Aldridge" and the Ch. held the action to be well brought. 3 Keble 369. Whenever an extraordinary case of this kind comes it cannot be treated as void.

As to collateral contracts, it is impossible to say that it is equitable they should be enforced and to protect the privileges of infancy in the instance of a female Bond. There have always existed diversity of opinion but on this I have expressed my opinion. Female Bills, promissory Notes, parole contracts of every description are voidable. Bac. Dig. 164. 1 Lev. 125 & 225. 137. 1 Vent. 51. 1 Keb. 1. Str. 85. 937. 1 Show. 35. 40. Mach. Inf. 575-6. Co. Lit. Sir Kenyon denies this and declares them to be void, and that if the infant and an adult join in the same part, in a contract, collateral. That the other party may maintain his suit as the adult alone treating the contract as void. The Infant as a nullity. Bac. Ab. 16. 8. 5 Bac. 47. But this if taken out to be law, for it is in opposition to the whole scope of the law above discussed, and very justly reversed by the Supreme Ct of Ct. Yelk. 6 Johns R. 160. Mach. Inf. 575-5.

Parks, do 432, Hair B. 102, 4 Bch 487. The cases in Alderson & Parks meet the case that I have laid down. I adhere to the opinion for they are cases directly in point and altogether provide satisfactory than a flood of other opinions.

I have remarked that there is a great difference in regard when they are sued for part only by the adverse party but any third person having an interest may treat it as void and take advantage of its invalidity, but when voidable only the infant and his representatives can avoid it as in the case of a Bill of Exchange endorsed by an infant it was good as all parties except the infant and so against him if he chose. But he could avoid it by plea of infancy, so in a lease the lessee cannot avoid it but is bound by his covenants in the usual clause 1 Co 124 2 Yo 603 Leith 436. Str 938. 2 Mo B Blk. 511. 3 Bac 504-6. 1 Ventr 51.

Again a voidable contract made during infancy may at full age be ratified and this either expressly or impliedly but void contracts cannot thus be ratified, for they are legal nullities hence there is nothing to ratify. It may be made over again or in the case of a fleme. Cowper 1 Yo 1 Ch 131-2. 2 Bulst 69. 5 Bac 534. Co Inst 320. Co Lit 30.

I must observe here that any act of the infant amounts to an intention to waive the privilege of infancy after attaining full age. Such affirms the contract. As when a lease is made to an infant and he remains in hold after full age. He is liable for rent for this amounts to an acquiescence in the contract. And it does not only render him liable for all after rents but his subsistence thus retaining

Fee tenants

back to the making the lease and he is liable for all rents unpaid which accrued during infancy — i.e. he cannot avoid it "ab initio" in ass. et B Co 65. / Bent 203. Str. 690. Co Lit 320.

That a void contract cannot be ratified vide 2 Ch R 766. 5 Bac. 330. 1 Ch Ch. 75. Doug 53 Comp 204. 4 Q. 7 Ch. 83. 1 Ros. 33.

Thus if an infant gives power to S.S. to convey his estate and he does convey the act of the infant when of full age cannot ratify it, for it is utterly void.

If an infant conveys by fine and common recovery he may avoid it during his infancy by a writ of error but not when of full age this depends upon the strictness of the law. During minority he is seldom bound to his infancy is to be ascertained by the Court, but after full age it cannot till whether he was an infant when the fine was levied is not being a question of fact but it is against the record and it cannot go to the country Coke Lit. 380. 12 Co. 122. 3. Mod 229. 2 Ld 197 1 Rol. 21. 23.

According to form all conveyances except those of lands may be avoided during minority or at full age. that is, it is void at his pleasure to Litt 192 b 247. b. 248. a. 380.

But it appears now well settled that his payments cannot be avoided till he is of full age. In his lifetime it is void as his act of settlement. hence the payments remain valide until he intermeddling his lifetime during minority, at full age he could let by the payments and had he in his lifetime but in posse mother. the fine payee and lessee as the same payees. The same rule

holder of his leases, releases, bargain and sale and of any form of common assurance, the rule is hereinbefore of tenements only for sale at the Com Law. it was the only way of alienation 3 Bac 294, 1808, 13 Mk 579, 2 Vk. 161.

Hence this arises between an infant conveyance by matter of record and out of record. The former are capable of being avoided during minority only. & the latter only at full age.

That his leases for years are not liable to be avoided by the infant till after full age vide 2 Vk. 161, Co Lit 380.

As to his sales of chattels personal they are avoidable at any age i.e. he may treat them avoid during infancy or after full age for the goods being of a transient & perishable nature it would be dangerous it would be dangerous to the infants privilege to compel him to delay till of age. 3 Bac 141.

This distinction of contracts void and voidable, relates to those which are executed. But there are a class of cases where in Chy the infant is bound but when at law he claims is not. And

Marriage settlements made before marriage and with the consent of parents or guardians, are in general instances binding in Eqy and the reason is that they are analogous to a particular contract which at law infants are able to make, viz. marriage. Hence Chy adapts its decree to the merits of each particular case, having a discretionary power to interpose, 1 Ves 424, 3 Atk 56, 1 Bro Ch 152.

The ground on which the Court infuses this

jurisdiction is that it has a kind of discretionary power to control an infant's and their interference is to direct their conduct as they think it according to the merits of the case. Where an infant female lunatic among in Essex* agreed to settle it on her husband, in consideration of a settlement made on her by him, Equity compelled her to execute the settlement. 3 Atk 613. 1 Ves Ch 111. 4 Burr Dig 19. 2 Ves 501. 1 Bro 44. 5.

Now it is well settled that a female infant may bar her dower by authorising upon marriage a settlement by way of jointure and that the settlement is of personal property. 2 Eq Cas Ab 2. 1 Bro 53. 1 Ves 55. 5 Br. 26. 5. 5.

But it is stated to be a doubtful question whether a male infant can bind his real property by way of marriage settlement and of this opinion is Bacon. But by real estate is meant freehold in fee tail, and if so it is improperly expressed. Fonblg 68-70. 4 Burr Dig 19.

In tracing down the early times they could bind their property by such agreement, and this right then founded is exactly in agreement what is directly to the contrary. For it has been decided that when an infant, male then settled an estate to and he had held in lieu, it was good. Bro 52. Cas Ch 604. 2 Ppr 229.

Lord Chancellor held that if a female infant being seised in fee agreed on her marriage to settle her estate on her husband in consideration of an equivalent settlement on money by her husband, the was bound by it 2 P. Wms 240. 1 Bro 48. If this is true

*Varying the word it could not extinguish it.

an important point is involved. But Ld Hardwicke says this Rule is going a great way but he says it is a Case which Eqty will enforce, provided there is an adequate settlement on her and provided also that the lawyer issue. but this leaves the question title after the death, 2 Atk. 283-5. & Ewins Deg. 6. 1 Bro. 50.

Ld Thurlow entirely denies the Rule in toto for he says the court is not bound, unless there has a settlement & which the accepts it after coverture and takes possession and whether the settlement is a competent one cannot be enquired into, according to this doctrine it is a wonderful contract, for her acceptance is an implied ratification, 1 Ch. Ca 116, 4 Ch 510. 3 Ward 453. n. & Ewins Deg. 17. 18.

Ld Thurlow advanced this rule after a solemn consideration under a full knowledge of the former opinions

The whole law on this class of cases may be deemed an infringement on the Common Law, but the merits qui is a consequence of the Common Law privilege admitting Respect to nearly. But, nearly when infractions should not go further than such merits requires, and if that settlement is for life, all the equities are answered.

At any rate the agreement of a female Infant is not binding on her unless made before marriage. for nearly when under the two fold disability of infancy and coverture they could not enforce her contracts 3 Ch. Ch. 57. 3 Atk 56. 1 Ambl 70. 4 Ch Chy. 254. this last authority applies to the following rule.

But it would seem that there is this to be a distinction between the capacity of a male

and female infant as to binding real property in a marriage agreement. The general question whether he can bind is unsettled. Lowndes & Ames say that he cannot Lewis Dig 119. But it is clearly settled, that if he on marriage an adult agrees that her estate shall be settled to certain uses, he is bound. For her estate is not affected. and the uses not coming into being of full age, Tolly 70. Ewins Dig 19 & 119. 4 Br Ch. 254.

But we have already seen that he may bind himself so far as a life estate, Stra 54. 1 Ves 52.

But I conclude that he cannot bind himself in a large estate and indeed it seems clear Lds. Hardwicke & Thurlow that the female bind infants females and I cannot conceive why there should be a distinction neither over the bearing of the case demand a settlement whole thereon for life.

No settlement will be enforced unless it is fair and reasonable and made upon adequate consideration the form is immaterial in every settlement in Eqy. But in the case of adults the Ct will not inquire into the adequacy of the consideration. 2 Atkins 244. 1 Bro. Ch 3 & P.C. 115 & 152. 1 Eq 69. 70. 1 Ves 47. 50.

Another class of cases binding on an infant is where on a contract of bequeathing his personal property bequeaths it on the payment of his debts. Clearly covering his bequest to amount to a contract and the Exec is bound to pay them. But this is not the case at Lond. Eq Cas. 282. 1 Wms 403 1 Ves 37. 1 Tolly 74.

Shows accounts when his evidence contracts can be entered at full age, i.e. there made by himself but they goes further, for a contract made by a third person in behalf of infants and the, having no authority, may be entered by the Infant when of full age, either expressly or impliedly. Thus it holds, where there were 3 infants the mother of them having no claim made a lease of their estate for 40 years, and all the children at full age entered impliedly the contracts by receiving rent, or better they received rent and they held it to be an implied ratification, and that they were bound. 1 Atk 489. But this never could be at Law.

What authorities an infant is legally capable of executing

This follows that an infant cannot execute a general power of real estate by reason of his supposed want of discretion, for by a gen. power is meant a discretionary power. Thus if a gift to A, an infant power to dispose of his estate, this he cannot execute for when the power comes is left a discretionary. 1 Ves, 278. 2 Ves. 304, 3 Atk. 695. Pow. of Powers 69.

But a naked special power may the property he may execute. By this is meant exercised not coupled with an interest, and which leaves nothing to the discretion of the infant, as if A. gives power to B. this he may execute. For in fact money or he is that a mere instrument. Co. Lit 52. 3 Atk 710, 714 - Pow. Powers 73, 76.

An infant cannot execute an authority upon his own inheritance. For that would affect his own interest. If P. P. conveyed his estate to A an infant, letting the legal title in A with power to convey to any or even to a particular person, A could not execute the power for it would be conveying his own estate. 1 Ves 305. Pow on Powers, 43.

Lord Hardwicke is made by the reporter to say that there is no precedent, either in Law or Eq that an infant ever executed a power over real estate B at 11. 710. 3 Bac 138. n. But this is too gen. for it is not true. It is true that he can exercise no discretionary power over real estate 1 Ves 304. But he may execute a special power Pow. Powers, 43, 47. —

The court is then an infant may if not interested execute a power so as to bind his principle provided such power is not discretionary. This is the true rule which Verg. lays down in the same case. When Atkins reported Lord Hardwicke's decision, I will observe here that Atkins is not the most accurate reporter. 1 Verg 304-6. Powell Powers, 43.

An Infant can personal property may execute a general power, provided he is of an age capable of disposing of personal property by wills. 1 Verg 303. 1 Pow P. 54. & This he may do though it should affect his own interest for even real property at that age he is supposed to have discretion. As if P. P. had conveyed to A. an Infant of 14, personal property with power to convey to B, or any other one. This power A can execute after he is disposing of his interest.

Of Offices which an Infant can hold.

The rule of law is that he may hold any ministerial office requiring only skill & intelligence but a judicial office he cannot hold. For such office requires discretion. Co. Lit. 2 b. Co. 6 36-7. Com. Dig. Office B. 3. Term

An Infant may be a bailiff or a merchant.

He may be a gaoler and as a gaoler he is the agt. of the Sheriff. But he cannot be a Sheriff for that office is often highly judicial. Neither can he be a steward or a master, for this is a judicial office for the steward holds a Court. Co. 6. 37.

The reason assigned for his holding such offices as he does hold is that they are such as can be executed by a deputy when he does not execute them.

I do not know in this State that an infant in this state was elected an Officer and yet I suppose he may as well as in Eng.

An Infant cannot be an atty. for he cannot be sworn by the oath of office. The law will not permit him to be bound by the oath of an officer. Thus being attended to is so high a responsibility. Neither can he be a juror for the office of a juror is strictly judicial. Hob. 325. 3 Bac. 1. 1.

I have explained how he can be an Exr. and when one as such.

When an infant by voluntary office he is bound to his official acts, and liable to any injury. The rule that bailees are not intended to

an infant notwithstanding, for if an infant is a gaoler or liable for an escape and if the escape is after execution he can be subjected in debt. Tho. it would be contract, because in fact it is not founded in contract, 5 Co 2d. a. b. 3 Bloa 22. 4 Co 44. b. that debt is the proper action vide 2 Yk. 129.

How far the Infant is liable for non performance of conditions annexed to his estate in office

Here it is to be remembered that conditions are of two kinds express or implied. By express conditions they are like adults, and so that if an infant has an estate to which is annexed a condition express, & the condition is not observed by him, the estate shall be forfeited, as thus on the happening of a certain event the estate shall cease, the lessee is bound & the infant heir of a mortgagor has neglected to pay the mortgage money and a forfeiture incurred by reason of the condition the infant is bound by the forfeiture, 10 Lei 246. b. 2 Ver 560, 333-4. 2 Ver. 211 Cart. 194. & 10 44. Cartt 43. This case is grounded on the most divine justice, would not be possible that because the mortgagor demised to an infant that the mortgage should be deprived of his vested rights.

But there is an exception when the condition imposes a penalty as if a lease is bequeathed to an infant by which the lessee is bound in a penalty to the payment of arrears. The statute lease cost be made on the penalty thereby the covenant & payment is suspended from a penalty 10 Lei 246. b. 2 Vent 200 Cartt 43.

If the condition in the lease had been that the lease should be forfeited she would be bound. But if a penalty is to be incurred by breach of covs or to pay double rent, the infant is not bound of course. For how it can never be ascertained to what extent his liability may extend and he may be subjected to great hardship, but to the former he loses the lease, and there is all he risks or lops.

Conditions implied as if two kinds thus formed in their aid and implication and then there are two. By the former an infant is bound as if the effect of the title is granted to an infant in fee, he will forfeit it by mismanagement for confidence is reposed in his skill and conduct. 8 Co 44. b. Co Lit. 55a. Co Lit 233. 1 Term 323.

But by the latter class he is not bound. Thus if he takes a lease for life and claims in fee he does not forfeit his life estate. 8 Co 44b. Co Lect 233. b

Conditions implied There is a distinction taken by that law, which I have cited. If it this. When the Ten Law gives a remedy for non-performance of condition or breach of covenant an infant is liable. and in that case performance or breach of cov. forfeits his estate. But for such neglect in the tenant the law gives remedy but certainly wrong and the infant is not bound nor can he forfeit his estate.

Same that are intended to be altogether relinquishing. Co Lit 54. a. 2 B. & A. 232. 8 Co 44. b. 1 Term. 322-3.

Infants are bound by their express words express and that against the express covenants for rent, does be incurred to an heft the rent. Lease distress in in the nature of an action the Com Law expires, they quit

also for the purpose of avoiding trust arrangements commonly called Statutes of uses, and given their circumstances it is that they are rather favored than otherwise. 1 Saund 31. & 1 Lev. 31, 1 Eq. Ca. 364, Pl. ch 518.

If an Executor Adm.r or Trustee of an Infant does not sue within the time prescribed by Stat the Infant is bound notwithstanding, he may be excepted by the Stat. 3 Pr. Wms 308. I was much surprised at this rule when I first became acquainted with it but I now understand it to be this. If the Infant possessed had an obligation. The Exec.r Adm.r alone can sue for they alone have the legal right, and if they neglect that they are bound by Stat. the infant is barred also. So if an obligation is given to Trustees in Trust, for an Infant the Trustee must sue, and if he neglects the consequence is the same. But when an obligation is given to an infant in his own name, the Trust must be in his own name, and he can not be barred if the Stat in such case, counts against. This I take to be the meaning of this rule.

How Infants are to sue and be Sued

I have treated of the rights, which they may acquire and the debts they may incur. It now remains to treat of the manner of enforcing their rights and how remedies are pursued against them.

The rule is that an infant must sue by his guardian or next friend. he cannot appear by atty. because he cannot make a power of atty. which can be given in person. yet he is allowed to sue.

direction, so that when he is of age his guardian must be named and the suit must stand there. The Court, however, by A.B. his guardian & next friend is the same may be and if this requisite is neglected the suit will abate. See 640. Parsons, 225, 250. 3 Bac 14.

If the infant over 14 years by guardian & the left can appear & sue by the P.P. & disability. 1 B&P 301, Lil 156 b, Co Lit. 123. 2 Inst 212.

Generally an infant could not sue by guardian but by Stat Westm: 1 and 2d in certain cases he may appear by next friend, but these are all cases of inequity. See 640. Hen 7th. Parsons 295. All these cases are in nature of

5th When he has his Guardian. See 640. Parsons 295. Stat 3 Edw 2d, ch 5 — 2d When the suit is against a stranger and the guardian refuses to appear for him. See 640. Parsons 295. Hen 7th — 3d When he has no Guardian. Lil 155 a — 4th When having a Guardian he is suspended from him i.e. out of his seat. See 640. Parsons 295-6. 3 Bac 149. 2 Ins 650.

When are all cases of true inquiry. In any other instance he must sue by guardian. If he is not an infant, however great is his ability, even tho' he may sue by his next friend at his election. But then must first have set up the existence of the guardian & the notice he could appoint his own guardian, i.e. argue that he might elect. See 12 Co Lil 135 b, Co Lit 88.

If this and take the together the whole clause being an infant the need not appear by guardian but may appear by atty appointed by the husband and the atty may plead in their name, and the man may be sued by him, in their name. 2 Inst 213

But where an infant sues by guardian & next friend his plea must be signed by his guardian & next friend and not by atty.

2 Sw.

When an infant sues by guardian the action is made for the costs if the def. pleads and the guardian may in such case be compelled to give security and the rule is the same if the suit is brought by his next friend, Dist. Ex. 72. Fitz. 50 Co. 10. 26. 10 Mod 28. Wms 130. 1 Ch. 491. 1 McCalla 60. Phil Ev. 46.

Indeed the commencement of the suit is always allowed: the act of the guardian & the law will not permit him to bring an action and of immaterial thing the costs upon the def. and for this reason he is compelled to give security for the costs and is liable to attachment in default of payment. But arrests of an infant are liable to attachment 2 P. Wms 2,98. Phil Ev 87. But the very case in which this was determined was an appeal to Lord Chancellor King who decreed that there was no case in which an infant P. was ever held for costs of suit either at Law or Equity and denied the rule. Stra 708. Mosp 26. 1 Wms 130. 2 Eq Ca 238.

There is a sufficient reason for the rule in that the infant cannot be deemed his friend if the suit is given against, for he is not supposed to bring the suit neither is his consent to any one a bar to any impediment & should he even appear in Ct and repeal to prosecute it would have no effect.

But the question will naturally arise against the guardian or next friend when he humbly begs a suit for the interest of the infant. This question is received

till the time of the guardian's accounts with the ward which is being is before the La Chancellor, and in this country before the prerogative Court, i.e. Ecc. of Probate. and if it appears that the suit was honestly bred, for the protection of the rights of the infant he will be allowed his expenses out of the infant's property.

But when an infant defendant is joined in a suit he is always liable for costs. in the first instance Stra 1217, Dyer 104, Bacon 189, and his guardian not liable at all.

The reason of this diversity is this, costs are allowed universally as penal, a substitute when the Pltff is injured, for the ancient amercement, "pro falso clamore". But when a defdt is injured he is conceived to have been in a wrong in keeping the Pltff out of his just rights. Hence when an infant is defdt he is allowed to have been in fault, and this is the genuine presumption Esp Dig 106. In this authority it is [illegible] and laid down that the guardian of an infant defdt is liable and considered as if the infant was sane, i.e. the infant is not a ward. But this is not Law, nor is it supported by the least authority.

According to the Eng. rule of practice both guardian and "prochein ami" must be admitted either by the Court, or by the Ord. out of Chy. for that purpose. The reason is that the rights of the infant may not be affected by the acts of an improper representative 3 Bac 148, 1 Stra 304, 709, La Ray 232, Paxm. 225, 250, Cart 255, 3 Atk 603.

But by this rule it is not to be understood that a guardian or prochein ami may commence

a fine without leave of Court, or writ issued out of Chy. for that purpose. He is prevented any "mischief" consequence of fine without the consent of the infant. but he may be bound by the Court to prevent it, the rule then means only this. that before he can appear and act in Court he must be admitted by the Court, or by bill out of Chy. 2 Bac 680. 3 do. 149, 151. 1 Ewart cas abridg 82. 1 Bth. 464.

If an infant and an adult are Co Exs. in an action by them both. the infant may appear by atty. admitted by the court, and this for two reasons, 1st. The general principal of law is that when two have a joint right the act of one is the act of both, and relates to that right, 2d. That the infant when acting as executor acts in "auter droit" and of course his own rights are not affected. 3 Bac. 150. 1 a. 1 Rol 288. Cro C. 541. 2 Saund 212-13. Carth 113, 213. 1 Vent. 102. Salk 252 600, 149.

On the other hand if an Infant and adult are joined as Coe 21. the infant cannot appear by atty. If there were no joinder there is no presumption of their being co-executors because they are sued as such (but when they are Plffs. or in contradistinction they are Plffs' co-executors and then the action was not mutiny) and besides the rights of the infant may be the effect of in consequence of mis-pleading judgt. is rendered vs. them, executors jures "de bonis propriis" hence the minor acts in this case as in others, by guardian. 3 Bac 157. Ferr 318. 3 Mod 236. Toller Ex. 472. Yelv. 130. Hob. 148. This far as to the general relation to an Agent. Plff in an action -

How an Infant is to be sued

Here it must be considered that an infant he never appears by Guardian, he cannot appear by prochein amy. The reason is that at Com. Law neither infant nor idiot could appear but by guardian, and the first proceedings should be appear by next friend, which is those cases only where such infant, or that or to Defd. the old one attains.

Where he is defd. his person must be served by guardian 3 Bac 198. Pleas 225, 256, 2 Bac 080. Co Ent 640, Hutton 92, Co Lit 134, Tab. 256.

But as an infant who has no guardian is liable to be sued, there is a rule by which the court must appoint one. In this jurisdiction such called "Guardian ad litem". The authority of the Guardian extends to management of that case and no further 3 Bac 149, 5 Co. 53, Co Lit 89, 135, b, 2 Lev. 130. 3 Bulk. 427. & 437.

If the infant has a guardian the Court cannot appoint an ad litem unless the fellow is at a stand of juncture of his minority being and the reason is that if the Court had such power, they would usurp from the jurisdiction of Ecclesiastics, and appointing guardians which belongs to other jurisdictions 3 Bac 150. n, Co Lit 424. Hutton 455.

Where if an infant has a general guardian and is sued his the guardian must be summoned to appear and defend in Court, otherwise there will be judgment could be erroneous. But if he is not summoned the proceeding was not for this cause void but time is given to the defd. the guardian to appear.

If an infant defd. appears by atty and pleads it is usual as bein it is dangerous, and upon trial

of other persons notes" it will be received 2 Bro. C. 149. Co. Lit. 340. Hutton 92. 2 Bro. 248. Yelv. 58.

So also at Com. Law it appears that if an infant sues by his Ally and judgt is for or against him it is error but the authorities are somewhat contradictory but the better opinion is in favour of the rule. 3 Bac. 150. n. Co. C. 124. Roll 257. Croth 542. The two last authorities supported that it is not error when the Judgt is for the Plff. But now by Stat. 21 Jac. ch. 13. Sec. 2. If in first case judgt is for the Plff infant, or verdict the deft. may assign it for error by Stat 4. Anne. Chap. 16. Sec. 2. The rule is the same if Judgt is for the infant by default, or "nul dicit" 3 Bac. 149. n. Co. Lit. 380. 2 Bac. 195. 1 Bac. 932. Lev. 213. n. But if Judgt is against the infant it is error and his privilege of infancy is not affected by the stats above. Croth 123. 2 Com. Dig. 357.

If an infant is joined with an adult and the Defendt appears by Ally and judgt is given against them with the same exceptions it is erroneous, for the damages cannot be separated or apportioned being entire 2 Bac. 198. 228. Co. Lit. 289. Roll. 776. Lev. 406. Cart. 357. 3 Lev. 435.

In Connecticut there is a different rule. It is held that it cannot be received against the infant when it does not lie against the adult to implead it, for it is a rule of the com. Law, that when two or more are guilty of a joint offence or trespass, the offender may account for the whole damages, but the adult is liable for the whole. I should think this quite convenient, were it not for this consideration. Had the adult been sued alone the damages might have been quite different for in this case, had the infant might have been the great aggressor and his

against Conduct the Cause of highly increasing the damages
& thereupon think the Exp.ts Counsel was correct.
C. J. Chantefleur

But in this case even had the damages been
assessed judg.t would have been entered against the Deputy
only. and the learn.d Judge was then substantially
correct & entitled judg.t for. in fact there is but one 5
Co. 58. Plow 189. 808. 4 Burr. 2202. 1 Roll 747. 776.

If an infant and an adult join in
buying a piece the Infant may recover in assuming
it. But it is good against the adult for the reasons,
1st That the contract of the Infant & adult are several &
distinct and of course no action of the infant can injure
in permitting the joint tenant good as to the adult. 2d
A joint & several covenant operates, it is in the nature
of a covenant made with a stranger & an act, and it is a
good rule that when an infant and adult join in a contract,
where the fact is not found but that the contract is entire
applies more strongly to the case of a joint. 2 Bac 289. Yel. 278.
Ro. E 115. 124. 2 Leon 108.

Infants in ventre sa mere

The Civil Law, that the Common Law
in this respect has made great in modern times a great change
has an infant "in ventre sa mere" is regarded "in esse" for
many purposes, that was unknown to the ancient Common Law.
1 Black 130.

The killing of an unborn child is not a Common murder
but is a great misdemeanor i.e. a high offence under

the degree of felony. 3 Bac 665. 4 Blk. 198. 1 Hawk. 121.

But if a child, in ventre sa mere is mortally wounded or injured but is born alive and dies within a year and a day from the time of the injury inflicted, it is homicide and for this purpose the child is in esse regarded as, & in this both the ancients & modern Civil Law agree. In one of the Books you will find it laid down that this is never murder 1 Hale 433. But this is wrong law. But it may be either justifiable or excusable homicide, manslaughter, or murder according to the circumstances of each case, as they may warrant. 4 Blk 197-8. 1 Hawk 121. 3 Inst. 50.

They may inherit and are regarded in esse for that purpose, and entitle the heir to the inheritance descend to the heir presumptive, and divest in favour of the new born heir 2 Bl. R 203. 2 Burr 403. 1 Wms 486-7. 5 Mod 160. Feb. 3. 16 90 a 95 a

An infant in ventre sa mere is regarded as this day to be "in esse" so as to take as a devisee. Fearn. 429. Co 225. 3 Ric. 256. 1 Wms 486. 2 Ch Ca 386. 5 Ves. 49. 51.

Formerly, there was much curious learning connected on infants other circumstances, taking a devise. A Rule was that when the words were "de ventre de presenti" he could not take. But when they were "de ventre de futuro" he could take. This distinction is now exploded, and the "devise".

He is in esse for taking as legatee as well as devisee 1 Ch Ca 356. 1 Ves Sr 243. 1 Blk. 130. 1 Ves. 114.

The Estate accrues to the heir under the will of the devisee when it is divested in favour of the posthumous devisee 2 Ves Sr 9. 1 Wms 486. 2 P Wms 128. 1 Ves 114. 1 Ves 135.

An infant in ventre sa mere may take under

the Stat of distributions and is in force for that purpose. 2 Dev 446. 2 Ath 117.

So also Infants in ventre sa mere are in force for the purpose of taking under a devise created for minor portions for children as it would have at his decease, i.e. Eng. where the Father devises to place his children on equality as regards his property he creates a long term 500 years for the minors a portion for the younger of his children, and this portion must be paid before the term is determined of course the heir at law can obtain the free enjoyment of his estate only by paying such portion Ru Ch 50. 1 Dev 246. 342. 2 Ath 399.

An injunction will be granted on the commission of waste in, that infant behalf. and of course is allowed in equity for this purpose. Ru Cha. 50. 2 Ba 710-11. 2 Ath. 117. 3 Bac. 123.

So also under the Stat 12 Car 2d such a child may have a testamentary guardian appointed for him by his Father. Now the Stat provides that the Father may appoint guardians for all his children since at his death and an infant in ventre sa mere is regarded alive for that purpose. 1 Ath 136. 462. 466.

Such an infant may be an executor and manager act. 3 Ba 123. 1 Com Dig 285 235. 5 Co 29.

And if two are born they shall be co-heirs 3 Bac 123. And in ordinary of the same. If a devise is made to an unborn in part of it. and two or more are born the first 3 Ba 123. Impliar this means two or more born at one birth. H.C.

Relative rights & duties of Parents & Children

It just becomes necessary to distinguish between legitimate and illegitimate children since their rights are very different.

1. Who are and who are not legitimate?

A Legitimate child is defined to be one born in lawful wedlock or within a certain time afterwards. 13 Ed. 446. Co Litt 244. Co Jac 341. Or in other words it is one begotten or born during wedlock or within a certain time afterwards. Nothing more is meant by this rule than that no one not born agreeable to this rule can be legitimate. But it is not true "a converso" that all who are born under the rule are legitimate for one may be born during lawful wedlock and yet be a bastard. But no one not born during lawful wedlock or within a certain time afterwards can be legitimate. Cro Jac 483. Stra 940. 5 Co 98 b. 1 Blk 457.

Blackstone defines an illegitimate child to be one begotten and born out of lawful wedlock 1 Blk 454. But this rule is incorrect. In reason after conception the parents married and the law owns upon the birth of the child. The child is legitimate. Yet it answers to the rule of Blackstone, for an illegitimate child, for it is both begotten & born without wedlock. But the true rule is. That an illegitimate child is one begotten out of wedlock & not born within lawful wedlock nor within a certain time afterwards.

The Presumption of legitimacy means nothing more than this that the child being thus born the presumption is that the child is legitimate and this presumption is very strong and conclusive no other proof was admitted but just

as rendered the legitimacy impossible. For the fact of illegitimacy could be proved only in two ways. 1st By shewing impossibility of access by the husd to the wife 2d His impotency. The old rule of the Co. Law permitted illegitimacy to be established only in one of these two ways. Co Litt 244 a. 5 Co 98. 2 Stra 176, 940. Salk. 143. 1 Bl R 159.

It follows then that impossibility of access however strong could be no proof of the fact of illegitimacy. Eck Dig 483.

But the rule in modern times has been much relaxed. In case of absence of the husd the old Com. Law rule required that the absence should be beyond sea, from the time of conception till after birth. Absence within the realm was not sufficient. Co 244 1 Rolle 358. 1 Bac. 310-11. Salk 122. 1 Bl R 457. Salk 483. 223. Lev 375. Carth 122. It resulted as a necessary consequence of the above rule that if the husd was absent beyond sea, even for 10 years, and the wife only after his return bore a child, the child would be legitimate, which he was found to be impotent. Now it is perfectly obvious that in point of fact the child could be illegitimate, but the old rule of the Com. Law was so rigid that, the husd having access before the birth in this case, it is presumed by the law that it is his own. So also if on his return after an absence of 20 years beyond sea, intercourse the day of his return and the day following a child is born it is legitimate. Then cases became the husd to be impotent. Co Litt 244 a. Salk 182, 484. 2 Rolle 785.

But no access may be had by other evidence than that of being beyond sea. And in all cases where the question is such a non-access. It is for the jury under all the circumstances of the case and

they are at liberty to find non-access tho. the husb. may it have been within the realm. Co Lit 244. 3 P Wms 276-6. 5 Ellw 413. Stra. 925. Eth Dig 484.

So also impotency may be proved by apparent evidence than that warranted by the ancient Com Law. and it may be proved by any circumstance, person & legal, that evidences to establish the fact, as the state of his health his &c &c. Eth 483. Stra 940.

As the Com Law now stands other evidence than non-access, or impotency is admissable to prove illegitimacy and now any evidence is admissible which tends to prove the fact. Eth 594. 2 T.R. 355.

The evidence now admissible does not go to shew the utter impossibility of access, but the great improbability of it.

The issue of a marriage null and void "ab initio" is illegitimate, because there is no celebration of marriage in the eye of law. And of course their cohabitation is meretricious and the parties bastards 1 Bl 435-6-40-50-56, Co Lit 251, 235, 1 Bac 311, 1 Ath ab. 357, 360. 7 Co 41.

But the legality of a marriage which is not absolutely null cannot be called in question only during the lives of the Parties and the issue of such marriage cannot be bastardized by proof of the illegality of marriage after the death of either of the parties thereto.

For what marriages are void and what voidable see Tit. "Husb & Wife"

A child may be proved actually illegitimate after the death of its parents, tho. born during lawful wedlock. When the question arises upon such

the life is not admitted to prove it but it must be proved by others, for the rule Lex dementiae has arisen two reasons, 1st it is contrary to the policy of the law, as it tend to disturb the peace of the family 2d that it against decency and morality that she should in Court proclaim her disgrace and publish her shame. But she is admitted to prove her own incontinency from the depend, malpity of the end the 2 reason also withstanding Comp 594 Bul 112. Esp 485. 1 Phil 340.

By the Canon & Civil law both before marriage is legitimated by a subsequent marriage, but the rule of the Common Law is otherwise and they are not by that subsequent marriage legitimated. 1 Roll 24. 1 Bl R. 454. 456. 6 Co 65.

All children born of a widow so long after her hus. death that by the common course of gestation. cannot be his children and are bastards 1 Bl R 456. Co Lit 541, but length of time is required for gestation does not admit to be ascertained by the Law. 1 Bl R 456. Co Lit 54. Esp 485. The decision of this question belongs rule belonging to the medical faculty, than the legal.

The best rules on this subject are by Hardgrave in his notes upon Littleton, according to Blackstone nine solar months and ten days, according to some 40 weeks, & Lord Coke says, nine solar months. But this is not always correct tho as a gen rule it is. Parson 9. 1 Roll 356. 1 Bur 312. Co Lit 123. b. n. 1. 2. 1 Bl R 456.

It seems that nine solar months may be shortened or prolonged by circumstances If so all this rule is not invariably true 1 Bur 312, Co Lit 541, or 541

If a child is born during the usual

period of gestation computing from the time of the husb.ds death. The child is as legitimate as if born during the husb.ds life in lawful wedlock 1 Bl R 456. Co Litt 8. 1 Rol 356. 1 Bac 312. This is the presumption of the Lord.

On the other hand if the child is born after the expiration of the proper period it is presumed to be illegitimate but the presumption in both cases may be rebutted. The effect of the rule being to throw the onus probandi on the one party or the other as the case may be. The presumptions being of fact like all others of this nature may be rebutted. 1 Bl R 456. Co Dac 541. 1 Roll 357. Co. Litt 8.

For example when the children are or are not legitimate after or before the decease of mere mother. vide 1 Bac 312. Co Dac 541. Bull 114. Ech 485.

If a woman married immediately on her husb.ds death. and a child is born within nine months that according to the course of gestation it may be the child of either of her husbands. It is said the child may when of the age of discretion elect which he will have for his Father 1 Bl 456. Co Litt 8. 1 Bac 312. 1 Roll 357. This rule 2 Ment mei not hold if there is satisfactory evidence of this three hundredth part it is only upon the total absence of such evidence that the law gives him his election

It is said in the Books that an event is destroyed after his own death the reason is that personal effects die with the person. in analogy to a bill of mortality "personalia cuta moritur cum persona" 1 Bac 315. 7 Co 44 Foxd 668. Co Litt 33. a. 245. This rule holds in an action only and this is as between. "bastard ex gene" & "mulier

prime" i.e. one born before wedlock, and the bastard issue of the marriage Cro 486. 3 Lev 410 Bac 315. a. In pursuance of this rule if the bastard enter upon his father's estate and die seized, his issue shall hold to the exclusion of the mulier 7 Co 44. b Leis 33. a. 245. 1 Bac 315

But to exclude the mulier there must have been an uninterrupted descent by the bastard and a descent to his issue hence it follows, that if during the life of the "bastard aigne" the mulier exists heir (as he may do) and the "bastard aigne" does not regain prop. and dies the mulier takes because of the descent having been interrupted in the bastard aigne and it follows from this rule that if his issue is not born at his death they cannot take Co Lit 244. 1 Rolle 624. 1 Bac 316.

Of the Rights and incapacities of Illegitimates

The rights are such only as he can acquire for he cannot inherit any thing hence he is called, "filius nullius" "filius populi" he is said to be next of kin to no one except his own issue 1 Bl R 458. 9.

But "filius nullius" for all purposes is not true and as I conceive the law now to be it is true only in the question "of the right of inheritance" For in infant cannot contract marriage within the Levitical degrees, and it has been decided by the Ecc. Law Cts. that it does not apply to cases in which the law requires the consent of parents, & it has been decided that the consent of the mother of such child is necessary for marriage and for the same reason the consent of the Father also. (This rule seems not to be law) If he is married, that in this the Ct. is silent, for it has been de

determined that the consent of the mother is void. This is laid down by Sir Wm Scott and other civilians. But whether this question has come up in the Com Law Courts of late I do not know. But I have no doubt but that they will follow the doctrine of Scott &c. 5 Mod 168. Ld Ray 68. Comb. 365. Lowe 62, 1 Bl R 458, 4 Z R. 95, 100. See extracts of cases in Dr Commins 22 Vol Christian Chron.

I think at this day the maxim "filius nullius" applies to the law of inheritance only and so it is expressly said by Justice Buller 1 T.R. 101. and indeed it is impliedly admitted by Littleton who says that a bastard is "quasi filius nullius" because he cannot inherit, Litt Sec. 188. Co Litt 123. 1 Hob 458-9. 1 Bac 309.

A Bastard may acquire a name by reputation tho he can have none by inheritance for he derives none from his mother and his father is not known. Co Litt 3. 1 Bl R 488-9.

And by such name he may purchase. Litt 134. Dyer 313. Doe D. 319, 338. Park S. 26. 1 Atk 410. 1 Bac. 309.

So also by the name of "at the son of J.S." if he has acquired the bens called the son of J.S. by reputation Doe D. 338. 1 Atk 410. 6 Co. 65. Co. Litt 3. b.

By the description of "issue" he cannot take, for the legal meaning of the terms "issue" is synonymous with the term "heirs of the body" & it has been said that he cannot be heir in any sense of the word. Co Litt 3. b.

A 1824 N.B. This year it has been decided by the Supreme Ct of Errors of this State in Hartford County that a bastard might inherit from his mother. T.C.

I have observed that he may acquire a name

by reputation as the son of J.S. But this is only done by continuance of time Co. E. 510. Bro. & Cow. Dr. 339. 333. Co. Litt. 123. 5 Co. 65. 1 P. Wms. 529. Hence it has been held that if a contingent remainder is limited to the eldest son of A. legitimate or illegitimate he then having none, but afterwards has an illegitimate son, the bastard cannot take the reason is, that he has not the reputation of being his child at his birth, and it is uncertain whether he can ever acquire that reputation. The contingency therefore is too remote, Co. Litt. 3. b. 6 Co. 65. Co. E. 510. But it has been said that such a limitation to the bastard eldest son of Jane Stiles would come to the bastard child afterwards born, and the reason is that in this case there is no uncertainty for he acquires the reputation of being her son by being born of her 1 Bac. 309. Roy. 33. 35. Now if uncertainty was the only objection it would have seem to be obviated and the limitation would remain good. But such a limitation I believe to be bad. For it is limited upon a too remote contingency for allowing that there is no uncertainty of the person. Yet the birth of an illegitimate child is "potentia remotissima" says Blackstone and it is thrown to you that remainders limited upon a remote contingency are void. Now as the law presumes no embrace but lawful it presumes that no bastard will be born. Hence it is "potentia remotissima" This is discussed by Hargrave in his notes on Littleton Lit. 2 Bk. 170. Co. E. 510. 1 P. Wms. 529. Co. Litt. 3. n. b.

Illegitimates can have heirs only of their own body. Co. Litt. 8. b.

Settlement of a Bastard

In Engd a bastard's settlement is regulated by in the parish in which he is born 1 Bk. 312-3. 459. Talk. 427.

If the custody is taken by the Mother for nurture and then she goes into another parish, and in which it was born must support it. But there is an exception to this rule where it is practised upon the parish in which the infant was born. If a woman is ordered by justice to be removed into another County and is after warrant delivered of a bastard child, the parish from which she was removed is bound to support it. This is to prevent collusions between parishes, delivering the lower of vagabonds 1 Bk. 459. & 2 Ark. 121.

The rule is the same if she goes to another county for the purpose of lodging and is afterwards upon the warrant was delivered of a child. The settlement is in such case in the parish from whence she came 1 Bk. 459.

Duty of Parents toward Bastard Children.

This consists chiefly in their obligation to support them. 1 Bk. 457. This obligation arises from a principle of natural Law, for as the parents by whom they are brought into the world are the instruments of their birth. The law of nature requires that they should not permit them to suffer for want of maintainance, for altho the relation of Father or child is not recognized for purposes civil yet as to certain natural rights it is. The word "maintainance" is inc. 1 Bk. 457 & 8.

The proceedings in Engd to enforce the performance of these natural obligations regulated by Stat. 43 Eliz. Ch. 3d. 7 Jac. 1. Cap. 34. 3 Car. 1 ch. 4. 13 & 14. Car. 2 ch. 12. and are found in 1 Bk. 455. 1 Bac. 317. It is not necessary to examine them. There is a statute in Ind State has on this subject has been of its own. But it will

not be out of place to mention a few cases.

1 The Father and Mother of an illegitimate child are bound for its support. 13 Pick 458. Com. Dig. Ch. Bastard. G. 2

2d Under these statutes the Mother is a competent witness for she has no interest the prosecution being by the Parish Officer 13 Pick 458.

3d The Commth by stat. the Mother was even prosecutrix and in this she is also a competent witness.

4 But her oath unnecessarily concerning the person charged with being the father may invalidate her testimony by other evidence in this as in other cases. This holds by our own & the Com. Law. 13 Pick 458.

Under these statutes if the deft is found to be the reputed Father, the Ct make an order of filiation and maintenance on him 5 Pick. 373.

It is said by Blackstone that if the mother of a bastard dies or is married before delivery & suffers an abortion, the deft is acquitted. 13 Pick 458.

So far as the Eccle. Courts to her death or abortion it is unquestionably correct for in either case there is no child to maintain, but as to her marriage I doubt the correctness, for if immediately after marriage she is delivered and there is satisfactory evidence of it that her husband be the Father the child is a bastard and state is the real Father is not discharged and there in this as well as in other cases is bound to support it.

What the Mother has written to on her examination under a false oath and before a magistrate is good evidence after her death to support an order

of Relation. This is in consonance with the general rules of evidence that what a witness has spoken to in a proper Court under a proper oath may after his death be given in evidence in the same cause, between the same parties 5 Ch. 373.

Rights and duties of Parents

The duties of Parents toward their children consist principally in three particulars, maintenance, protection & education 1 Bl. 446.

I Maintenance. This is founded on natural law. for those who give life ought to support it so far as they are able 1 Bl. 446-7. This consists in furnishing necessaries.

There is a difference between a Parent's liability to support his infant children and his adults. His obligation as to the former is absolute and unconditional except so far as they are entitled to assistance from the Poor by force of the Poor Laws, and the reason is that in contemplation of law they are incapable of supporting themselves. 1 Bl. 449. 1 Bro Ch. 368. 387. 1 Ves. 160. 3 Atk. 399. 2 Cond. Dig. 230. 3 Day 97. This duty is extend in Eng. by Stat. 43 Q. 1st & 3 Geo. 1 Bl. 448. This Stat extends the obligation to grand parents, nor does their liability cease with the infancy of the children for by their State all persons who are poor impotent and unable thro. want of understanding thro age or infirmities, shall be subsisted shall be supported by their parents & grand Parents, if they are of sufficient ability 1 Bl. 448-9. Stat. 180.

But they are not liable to support their adult children or grand children if the same are able to

labour or otherwise support themselves, and this is requiring principles of natural law. 1 Blk. 449.

But by our laws the same obligation exists when children & grandchildren to support their parents & grand parents if necessitous. In Eng. children are alike liable to their grandchildren are in doubt one. But I take the better opinion to be that they are not.

The obligation of parents to support their children is only secondary. Thus as parents, grand parents & children primary. Stra 180. Bulk 345. Stile 283. 1 Blk 454.

In Grand parents are not in all of the same parents are to support them. As grand children are not liable if there are children able to maintain them.

In Eng. a man is not bound to support children by his parent unless had in a former marriage & this because the tie of Eng. extends only to natural relations. 1 Stra 180. 2 Ven 353. Stile 283. 1 Ld Ray 444. 1 Bla 205. 2 Ld Ray 1454. 7 Ld Ray 1. 1 Term 27. 1 Term 255. 3 Burr 1. 12 Mod 34

In pursuance of this principle it has been held that maintainance by the second husband is a sufficient consideration to support a promise by the children when of full age to recompense him, and this would not be if he was bound to support them, for if he was there would be no consideration to support the promise. 4 East. 76. 1 Selw 197.

As regards in the addition of this case, no reference was had to the proper liability at the time of marriage for the independent fund, any liability under any circumstances. Nor may it not be questioned whether his home could be found not be liable, indeed might not the fund due to be this. That the second husband being of ability to support the should support them provided at the time of the marriage was himself of ability

to support them. For the wife in such case is a feme sole and does he not take her "cum onere" what burden is there the only this duty should not flow upon him as a consequence of marriage. It is true the Eng. Stat does not subject the second husband directly to attach to him. But it does subject the mother absolutely. and by consequence of necessity this obligation must devolve upon the husband.

But it is fully settled both here & in Eng. that the Hus. is not bound to support the Parents of his wife. This is a rule of Policy. less otherwise a corrupt tendency would be instituted Stat 180. 2 Bull 345.

But this duty to support children does not disable any one from disinheriting them by will 1 Blk 449. 450.

The mode of enforcing these reciprocal rights are found in 1 Blk. 448-9. But -

- Notwithstanding the Stat Regulations on this point. an action for maintenance procured for Children lies at C. Law. because the duty of supporting is absolute 5. Cob R. 1. 251. 3 Day 37. 13. Johns 480.

II^do Protection. This is founded on natural Law, and is neither prescribed nor enjoined by the municipal law. For the Father is not compelled to do it. nor he is not liable to punishment for neglecting to protect his children and can be alone made responsible in damages. As if. the Father sees a stranger beating his child he is not compelled to assist him. But he has the full right to do so if he pleases. Hence a Parent may maintain a Law suit without incurring the legal guilt of maintenance 1 Blk. 45. 2 Rust 564.

On the same principle a Father may justify a battery

in defence of his child. i.e. he may use the same force or violence which the child himself would have been allowed to use by law. 1 Blk 450 1 Hawk. 131. 83. Co Lit 296.

So on the other hand a child may maintain and support his parents in Law suits without being guilty of maintenance, and may also justify a battery to that effect. & to the same extent that the parent could in his defence. 1 Blk 454.

III. Education. Parents are bound to give their children a suitable education and this is a natural duty. In E.g. there is no law enforcing this duty, excepting that poor children may be bound apprentices by the overseers in pursuance 1 Blk. 426. 450-1

The duties of children to their parents consist in the obligation to obey and be subject to them during their infancy and to support them when poor, under the limitations before mentioned and protect them as has been already decided.

Rights and Powers of Parents respecting their Children

I. A Parent has a right to correct his children while minors in a reasonable manner. This is a right consequent of the duty of a parent, to maintain protect & his children minors. To discharge this duty he must have sufficient powers over the child to enable him so to do. 1 Blk 452. 1 Hawk 130. Then if he cannot restrain him without chastisement, he is at liberty to punish him moderately.

If the parent exceed the bound of prudence and moderation in punishing the child, the child may have an action by his prochein ami for the

for the law does not compel him to endure a degree of outrage and have no remedy. But as the Parent power is discretionary, he is not liable for slightly exceeding the limits prescribed by the rule nor is he liable. Nor is he liable thro' mistake or punishment thro' want of judgt. Hence to subject him the punishment must be unreasonable and malicious. 1 Hawk 73. 4. Reb R. 65. or Kelyng.

This power of Punishment may be delegated by the parent to a master, and the master in such case as to his rights & duties is "in loco parentis" 1 Blk 453.

The Consent of the parent to the marriage of his minor Child is necessary, and this consent is a bid of Course, and should his infant Child marry without such consent the marriage is void in Engd. 1 Bl. 452.

By our Law the marriage is good but the person solemnizing it is liable to a fine.

The Father has no power over the estate of his infant child, other than as guardian or trustee, liable to account when the Child attains full age or as the case may be before that time. As Parent then strictly speaking he has no power over his infant's estate. 1 Blk 452-3.

A minor is entitled to all the profits he may acquire otherwise than by service, to profits thus acquired the Father is entitled for in contemplation of law the child is his servant hence the labour of the child is that of the Father. 1 Blk 453.

On the principle of the child's being servant to the parent, the Father is entitled to an action "per

quod servitium amisit" against any one who has taken, beaten his child minor, by which he has incurred a loss of service Esp 645. 9 Co 113. 1 Blk 453.

So also is he entitled to this action against any one who should entice away his minor child for hence he sustains a loss of service. Peak R. 233.

But for an immediate personal injury to an infant child. The Father cannot have an action for the damages being to the infant, the foundation of the parents injury is the consequential injury by loss of the Children service. If the parent has incurred any expense in consequence of the injury to his infant he may recover it if he specially lays it as a ground of damages, as if his child was maimed & he expended money in procuring medical aid &c. Cro E. 55. Esp Dig 646 Ray 259. 3 Mod 18.

On the same principle he has an action vs any person who should seduce his daughter. in this the declaration must be laid with a "per quod." for the loss of service is the gist of the action. It certainly was an injury, But now it merely the foundation but without this, both alleged & proved no action of this nature will lie La Ray 1532. Esp 645. 3 Bur 1879. 2 T.R. 168 Cro E. 769-70. Stiles 398. 1 Roll R. 393-4. 6 Mod. 127. 11 East 24. 2 Lev. 1083.

And in this action the expenses incurred during the illness of the daughter may be recovered if specially laid 3 Mod 18. La Ray. 259.

But tho the loss of service is the foundation of the injury, yet it is not the sole or principle ground of damages. the real ground is the wounded feelings of the Father & the disgrace cast upon the

family 3 Wils 19. Lev 67-8. et in sect.

That, loss of service or service is not the ground of damages is evident from the fact that evidence of the slightest loss of service is sufficient and the jury have given enormous damages when the service was not indeed petitious but exceeding slight. and the Courts hold that the damages in this case need not be in any proportion to the loss of service. And La Kenyon has held at Nisi Prius. that it need not be proved that the daughter has ever actually laboured for her parents & that it sufficient if she lives in her fathers family, as a subordinate member of it. And this seems to be the evident rule, for thus living she is deemed his servant subject to his commands & directions so that he has a right to her service Peak 55 2 Str. 27. K. 168. 3 Wils 192.

And this action lies though the daughter in a pecuniary view is a burden to her parents and of no profit. still loss of service may be alleged.

But farther. the character of the daughter determines the question of damages. Upon evidence of her conduct familiar with other men is admissible in mitigation of damages

And it has been held by La. Kenyon that where the deft a married man was admitted by the Parents. to visit their daughter and she being induced no action lay by the father. Peak. 240.

And this appears to me to be sound on good sense & true morality. and is supported by an analogous case of an action for crim. con. with the Pltff's wife where it was ruled that if the Pltff. had consented or connived the action would not lie. in both cases it

is "damnum absque injuria" if indeed it can be called a "damnum" at all.

Both the ancient and modern cases agree in the well established rule that this action does not lie unless the daughter has been proved to have been a servant of the parent i.e. there must be proved a relation of master & servant, this being established the damages are regulated by other principles than those of "loss of service" La Ray 1032 3 Burr 1879. 2 T.R. 168. 6 Mod 127. 1 Black 373 Co E 769-70. Stile 398.

The age of the daughter so far as it respects her Father's right to this action is immaterial provided she acted as his servant when the injury was done or lived with him as a subordinate member of his family for in the former the law deems service and in the latter she is subject to his command and so that he has a right to her service. There is both cases the relation of Master and servant exists & this is the gist of the action Peak R 55. 223. 3 Wils 18. 2 T.R. 166. 2 Str 1084. Ja 1 2 Selw 1084.

The reason of this is that the gist of the action is loss of service but loss will accrue to the parent as well when the daughter is of full age as when under age. Therefore actions of this nature have been sustained by the Father when his daughter was in one instance 28 years old and in another 30.

It follows as a consequence that no contract (between the Father and adult daughter) of service is necessary to support this action by the Father. This has often been so held. 5 T.R. 252. 1 East 526. 2 in 276. 2 Selw 1084 ab & 4 Selw 387.

It has been held in Eng. that when the defdt with intent to seduce the Pltffs Daughter hired her as his servant and seduced her, that the action would lie with a "per quod servitium amisit" 2 Starkey 493.

It is said in Bac Dig 645. that to enable the Father to maintain this action the daughter should be a member of his family 3 Burr 1878. at the time of the seduction. This rule as expressed is too general for suppose her to be at a boarding school when she is received or living in another family when the injury was done. Caroning for the benefit of her Father. I think in either case the Father would have this action for in both cases the relation of master & servant exists for in the one case he could reclaim her when he pleased and in the other is entitled to her service & the reward thereof Bac Dig 645. In this conclusion it is said that Ld Mansfield in 3 Burr 1878. held that the daughter must be a minor to entitle the Father to this action. But Ld Mansfield said no such thing but he did say that the relation of master & servant must in some measure exist. in fact.

This action lies also for one standing "in loco parentis" 2 T.R. 4. as for an aunt.

So in favour of a master to whom the daughter was hired as a servant. Peck 55.

So also in favour of one who has adopted a female as his daughter 11 East 232. Lew 1087. And it seems that in neither of these cases. is the rule of damages. the "loss of service" For in 2 T.R. 4 where the aunt was Pltff. the damages were £300. on a rule for a New Trial it was diminished as

the agreement of the court after deducting her expenses to pay the damages, were to the men who at the time agreed not to prosecute an action which the court maintain against the Deft. — But in the case of the master Peak 56. damages were given exceeding the "loss of service" — and in the case of the adopted daughter the adopter was at no expense except having a at her lying in. but he earned £100. damages so that then case settles the point that "loss of service is not the rule of damages.

It is said to have been held at Nisi prius by Justice Chambers that in the action by the Father for the seduction of his natural daughter. the jury ought to consider her in the character of a servant and he recovered. Selw. N.P. 1087. Overruled in principle in 11 East 23.

In this action the daughter is a competent witness for she has no interest in the suit, either for or against the Plff. or Deft. the judgt. cannot be given in evidence for or against her. and even under the ancient rule that excluded a witness on the ground of interest, she was admitted but this is impeached & the reason why she is not interested is that for the seduction the has a separate action. 3 Ph. 181

But tho she is a competent witness for either party, the Plff is not required to produce her as a witness for he may prove the facts necessary to support his action by other witnesses but her absence nevertheless will be open to the observation of the jury 1 Holt N.P. 457.

An action merely for the seduction with a "per quod" is not an tiels, an action on the case and this becomes consequential damages are the gist of the action hence upon gen principle the father of the

action should be case. East 645. 1 T.R. 167. 2 N.R. 482. Ld Ray 1032 1117. 3 Bur 567. 6 East 388. 5 T.R. 136. 361.

Notwithstanding the action is substantially case. in Eng. it is in form of "Trespass vi et armis" and so decided in 2 N.R. 476. upon a review of all the preceding authorities. This position is supported by practice & precedent East 645. 3 Wils 18. 9 Bur 1878. 2 T.R. 4. Peak 233. 240. 2 Lev 1084. Cro 55.

Independent of the propriety of preserving the bound of these actions distinct, there is but one point which I think material in the two cases viz. the time within which the actions of Trespass & Case are limited. For as "Case" is limited to 6 & Trespass to 3 years. It may be of material importance to the Pltff as regards the propriety of bringing the one or the other, being barred by the lapse of 6 years in the one case & 3 years in the other.

If the Pltff legally entered the Pltffs House and seduced his daughter. The Pltff may bring his action for the breaking open of his house and lay the seduction by way of aggravation 2 T.R. 167-8. Ld Ray 1032. Salk 20 & 206. 642. 3 T.R. 292 1 H Blk. 555. 2 Wils 313. 2 Str 20.

Here the action is in substance "Trespass" vi et armis. For the gist is breaking. But if the Pltff can the defe prove a licence to enter, the whole action is defeated 2 T.R. 166.

This is in analogy to a general rule that where in mixt action the breaking and entry is justified and all land in aggravation is justified by a licence to enter. This licence means one given by the Pltff.

It has been said by one elementary writer that a licence is no defence for the subsequent wrong unless the Deft a Trespasser ab initio by relation back. But this is

clearly incorrect, for no one can be made "heir apparent" by relation, unless he first entitled by lineal of Law Vaut. S. 191 & Co 146 b. Yelv 96-7, Ent 383. 405, 2 Blk R. 1218. 5 Bac 151, 17 R. 12.

It has been a question much disputed whether this action (or an action) will lie for taking away a child without alleging loss of service. It was always held at Com Law. that if the child was heir apparent, the Father would maintain the action for by the feudal Law the Father was entitled to the value of the children marriage hence he might be a Cooper by the purloining. As to other children it remains unsettled by authorities, some support that he would, and again that the Parent has an interest in the childs education, is to provide for his education 3 Blk 140. Co 6. 770. Fitzh 91. 260. 3 Com Dig 426 3 Co 38. b 3 Bac 1879-80. argued.

In the states generally I conclude all the children are heirs apparent. But as the feudal law was never adopted here I conclude the question therefore in this country to remain unsettled according to the Com Law.

The authority of the Father over the child ceases when the latter arrives at full age, and is said then to be emancipated but the word "emancipation" requires some qualification, the Child at 21. is free from Parental Control. but he may continue a servant de facto without any contract after this age. In this case there is no actual Emancipation 3 T.R. 252. 1 East 526. 2 do 276. 1 Blk R 453.

The Mother as such owing the Fathers rights has no authority of the children. for all that the law supposes to be exercised on children it has vested in the Father

(the Mother as such among the Fathers life) and this is inferred, for if the mother had power over them there might be conflicting authorities. But it is notorious that the Mother does exercise domestic discipline in such instances the law presumes it to be done by the consent of the Sire.

Liability of the Father for the torts of his Minor Child

The liability of the Father in this subject is coextensive with the liability of a Master for the torts of his servant. Hence the Father is held in the character of a Master and in no other capacity, except for their contracts for necessaries in certain cases. And under our law, and I believe the Eng.t Law the parent is bound to pay the fine incurred by his infants breaking the sabbath, also the fine for neglect of military duty. such is the law in this State.

Guardian and Ward

There are four kinds of guardians known to the com. Law. — A Guardian is defined to be a temporary parent, i.e. one in "loco parentis" for certain purposes during the child's minority, and a child under a guardian is called a Ward. 1 Bl. 460.

The Guardian has the charge of both the person and the estate of the ward 1 Bl. 460.

This proposition the. stands need explanation both the estate and person of the ward it is true is under the care of the guardian but his estate is often under the care of one and his person under that of another

1st Guardian in Chivalry This obtained only when an estate holden by Knights Service is vested in an Infant by descent. Their authority continues till the infant if a male, attains full age, if a female till sixteen or until marriage. It extends to the person of his wards and all his lands within the guardian's manor, his guardianship was assignable. He was not compelled to account for the profits

This was abolished both the other military tenures at the restoration 2 Bl. 67. Co Lit 88. Note 11. 2 Bl. 67-8

Such a Guardianship is unknown in this Country

2d Guardian by Nature.

By some of the Books this guardianship is mentioned as if confined to the father 3 Co 38 a 6 Co 22 b. 3 Com Dig 415. 1 Bl. 461.

Not only the Father but any other ancestor may be guardian by nature, at C. Law, the Father claim was first - the Master next, and the more distant ancestors next - any whom the next in blood was forgiven and if two of equal propinquity claimed as if the Infant is heir apparent of both his paternal and maternal line the claimant on his Fathers side will prevail 3 Com. 415. 3 Co 38. a Co Lit 38. b. n. 12.

This kind of guardian-ship extends to the person only and not to the estate of the ward and it continues till the ward is 21.

This extends to the heir apparent of the ancestor and not to the other children. Not decided in Eng. whether it can ever exend to females for at most they can be but heir presumptive. 3 Co 38 b. Co Litt 386.

The Father may depute the claims of all ancestors by appointing a testamentary guardian under the Stat 12 Car 2.

In Eng. Parents are regarded as the natural guardians of their children, not that they are entitled to by the Com Law, but such they are by the law of nature. Co Lit 88. n 12.

3d Guardian in Socage

This like guardian in chivalry arises from tenure it takes place when an infant under 14. is seized in desent of land held by socage tenure 1 Bl. 461-2. Co Lit 87. b. 88. note B. 2 Mod 176. This guardianship belongs to the nearest kindred of the infant to whom the land cannot possibly descend. The reason is that there may be no tenure

to use to abuse the trust. 1 Bl. 461-2. It extends to the income of the land to his incorporeal hereditaments and it seems to his personal property. also the custody of person, is considered as carrying after it the custody of every species of property. 1 Rolle 40. Hutt 17. 3 Com 415, Cowell 186. Co Lit 87. b. 88. 89. n. 13.

This is not like that in Chivalry appendant for it is for the infant's benefit while that in Chivalry was for the use of the guardian Co Lit 88. Nowen 81. 1 Co Litt 478.

The ward may enter at 14. and oust his guardian and take possession of his entire income, and the guardian is compelled to give him all the rents and profits, being allowed to retain for his proper charges Lit Sec 123. 1 Bl. 461-2. 2 Bac abr.

This may be suspended by the absolute terms of a testamentary guardian Co Lit 89. n. 13. n

4th Guardian by Nurture

This takes place only when there is no other guardian at intervals to children who are not independent and continues only until they attain the age of 14. 1 Bl. 461. 3 Com. 416. 3 Co. 38. Mosel 788. Co Lit 84. 88. note 12. 89. n. 13.

This is exercised only by the Father & the Mother consent to alt. 14.

It would that it could never take place with his apparent for he is the if alive is the natural guardian of such children.

Guardian by Testament

By Stat 12 Car 2d. a Father whether is or are or not may by deed or will appoint by two witnesses a special guardian for any

& all of his children are infants and unmarried and also for an infant "in ventre sa mere" this appt. he may make in behalf or remainder it may be made to continue until he attains the age of 21 & to terminate sooner. & suspend all other guardianships and extend to letting the person and estate of the ward.

When the Ct. in its discretion shall be satisfied of competent age to make a will. The appointment by deed is a testamentary disposition & disposition for it can only take effect by his death. Co Lit 89 a. 15. 1 Bl R. 402. 2 402. 1 P. Wms. 703. 2 Ves 110. 2 Ves 12. 4 124 a 12 a

This power of guardian thus is not separable. the trust is fiduciary 2 Com. 234. 2 Ch. 41. 2 Atk. 14.

By Stat 4 & 5 William & Mary (Rice) guardians are created for females under the age of 16. for, bastardy, fundamental. in other it is sufficient the refer you to Co Lit 89 a. 14. 3 Co 39 a. 3 Com Dig 47 2 Bac 675.

There are also in Eng. Guardians by Custom. see Co Lit 89. a. 10 -

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There are a certain class of Guardians not enumerated by the old Common Law Writers called. -

II. Guardians by the election of the Infant,

3 Com Dig 4 Rich 15

This takes place only when there is no other fundamental reason by the law of the Estate as if the Infant has no estate by knight service he has no guardian in chivalry if he has no socage lands and is under 14. he has no guardian in socage. If he is not the heir apparent he is not the guardian by nature, and if he is under 14 he has no one by nature. and if the Father has not

appointed are he may make by testament. When situated an infant has no guardian and is not even his permitted to elect one Co Lit 87 b, 89 n. 16.

This guardian-ship is of later origin it has been in use ever since the Reformation in 1660. and it seems even before that period

It is said in our Books that this election is frequently made by the infant before the judges in the Circuit Co Lit 89 / Vesey Ver. 275.

The Eng.ᵗ Law has prescribed no form in which the appointment is to be made, it is doubtful whether it can be made by parole, but this is immaterial for it is at the discretion of the judges to approve of the election of the infant, Co Lit 89 n 16.

The age for this election is said to be 14, 1 Wh. 403, 490. Yet it is said by others that it may be made either before or after 14 Co Lit 89 n 16. And indeed it is said that before the Reformation the female was primarily confined to six years under 14. and the reason assigned was that the law did not allow a guardian to any great extent, especially after that age, Co Lit 89 n 16

When is no doubt but that at the age of 14. the election may be made, the only doubt is whether it can be made before that age, and by some it would seem that that is now a matter of doubt.

2ᵈ Guardian by the appointment of the Chancellor

This is of modern date Gilb Eq R. 16. 172.

The Cᵗ have acted this power since 1696. 1 Bro Ch. 544 The Chancellor may exercise this power when the infant is otherwise provided with a proper guardian. Hence two

things must concur. i.e. the infant must have a guardian and have such a one as the Chancellor considers suitable and proper for him it necessarily results that the Chancellor has a very extensive authority which extends as well to the removal as appointment of guardians.

The Chancellor has this power as representative of the King who is "Parens Patriae" of all idiots lunatics & infants. of his realm. Co Lit 89. a 16. 13 Ch 463. 10 Ves 703. Salk 44. Ld Ray 480. 1096. 2 Bac 679. 4 Co 126. 1 Atk 544. 2 Atk 177. 8 do 214. 9 do 116. 135. Ve ch. 166.

And so extensive is his authority that he may remove testamentary guardians. 12 Ves 160. 2 Com Dig 233.

3d Guardians appointed by Ecclesiastical Courts

The law as to this is very fully settled. the Ch. claim the right of appointing both to the personal estate and person of the infant when there is no guardian. as to their power to appoint for the person. it never was denied 2 Levinz 162. 2 Bac 679. 3 Keb. 384. 1 Bac 1490.

And their power to appoint as personal property of the Infant has of late been denied and it has been held that their power only extends to the appointment of guardians. ad litem 3 Atk 531. Co Lit 131 a 132 a. b

4th Guardian ad litem of the appointment of this is one specially appointed for a particular purpose. as when an infant having no guardian is Defdt. in a suit any Court upon motion for infant this appears may assign a guardian for that particular purpose in lieu. Co Lit 87. a. 16. 135. b. 3. Atk 427. 2 Ch. 130. 5 Co 53. b. 2 Bac 980.

The King's Bench may appoint this guardian by letters patent but this practice has been laid aside. Co Lit 88. n. 16.

Fitzgib 2.

Where the Infant is Off he always appears by guardian or prochein ami" & cause when he is Def he never has the assistance of guardian ad litem made parties.

In Connec.t it has been the practice when the infant was a delinquent in a crim prosecution for the Court to appoint a guardian ad litem. In Eng.d the Court have the same power but they usually act as the council themselves.

All of the above guardianships are principally unknown in Conn.t the guardianship known to our Law are three. I st Natural guardians. II Guardians appointed by courts of Probate. III Guardian ad litem.

By the Eng.h Law all guardians except in chivalry are compellable to a.c. for the W.d.s property in their hands. Co Lit 88. n. 7. That of chivalry being abolished the rule extends to all guardians of the lands of infants.

The usual remedy of the Ward is by Bill in Chancery. An action of a.c at law will indeed lie but it has given way to a proceeding in Chancery as the more extensive remedy than that at Law. In this case one be compelled to produce his Books & Papers which cannot be done at Law 2 Saunders 230. Co Lit 54. n. 7. 2 Bac Ab. 647. 13 Ves. 403.

It is an encroachment in Eng.d for the Chancellor to compel the guardian to account annually as the ward is always under age when he considers it necessary 4 Ves. 403.

The remedy by action in our Courts is almost

or remedied as by Bill in Chy in Eng.

2dly The Wards estate is in danger from the guardians insufficiency the latter may be compelled at any time and this even tho. the Wards parent is his guardian and this is upon the principle that the Chancellor can order an account at any time when he thinks the infant interest to be in danger. 2 Com 230 2 Bac 679 n 179. 2 Mod 177. 1 Eq Ca. abrid. 260.

3dly The guardian is guilty of any misconduct to the Ward Chancery may remove him. so also if there is any reasonable ground to apprehend misconduct. the Court may order him to give security and on his refusal remove him. 1 Pr Wms 763-6. 2 Mod 177. 2 Bac 679. 1 Bk 463. Fitz 44. Ld Ray 480. 1096. 1 Ver 442. 1 Ch Ca 174. 1 Ver 160.

No guardians except parents are bound at their own expense to maintain their wards. they may therefore apply the estate of the Ward to his maintenance but a parent is obliged out of his own estate to support his wards and if he is of ability Chancery will not oblige him to apply the wards estate to educate him. The reason of this diversity is that the duty of maintenance arises from the relation of parent and child. But if the parent is not of sufficient ability to educate his ward he may by permission of the Chancellor apply to that purpose the Wards estate otherwise the infant would be injured. for it is not in his power to apply his estate to his education and as the parents are unable to defray this expense he must go uneducated unless they were to allow such indulgence 1 Br Cha 38. 2 Com Ch 230. 3 Atk 399. 1 Ver 255. Pels 160. Talb 328. 3 Atk 60 399. 3 Br Cha 60 Ab 223. 2 P Wms 21. 13 Ves Jr 35. 5 & 540. Jr 122.

But tho a parent is bound at his own expense to support his child, yet a widow on her marriage is not bound to support her children by her former marriage out of the money applied their estate in that purpose. The reason of this is that her second husband is not bound nor if she was bound her husband would be criminally bound for if he neglected to support them the husband would be liable for her default. But we have seen that the husband cannot be bound. 1 Bl Ch 268. 1 Ves. 190 & 2 Ves. 363. This last authority is contra

It has been said that for any thing seen than necessary and reasonable where the parent may apply the Ward's estate if the object is for the child's support and the expense reasonable. Thus it has been held that the parent may apply the Ward's estate to, by the purchase of an apprentice club in useful trade 2 Atk 353. 2 Ves 157. 255. 2 Bro 230.

But this rule requires authentication and distinction been received by Lord Hardwicke 2 Atk 353. 2 Bro 230.

Even one of this point it would seem must stand only on circumstances, and the Chancellor's opinion is in such one judicial discretion. In Harvey 160. the Chancellor said he would do so upon an application may in cases in which the parent would totally incompetent, demurrer.

It is said that a guardian or parent may sue and the joint by equal partition 2 Bac Ab. 2 Title 250

If a creditor of a ward on a consideration receives from the guardian less than is due to him the ward and not the guardian sue the creditor of the ward 2 Bac 2 Ab. 2 Bac. 377. 2 Bro Ch 245.

A Guardian in Chy is regarded as a trustee in relation therefore if a stranger intermeddles on the infant's land and takes the profits he is accountable as trustee & the infant or his survivor can bring an action at the election of the infant, for it is not in the power of the stranger to deny that he is trustee if the Infant so chooses to consider him. 1 Atk 489. 1 Ver 436. 2 Cas 230 2 Ven 689, Pitt Cch. 2 Ver 295. 342. 1 Dig Eq Ab. 287. This rule is for the benefit of the infant.

The Guardian is compellable to allow interest for the wards money in his hands which he can shew that interest could not be obtained for it 2 Ven 629.

It is the duty of the Guardian having personal property of his wards to pay debts charged on his wards estate and not pay them with his own property. He is bound in the interest to prevent the accumulation of interest against the wards but this Court will be the case and the guardian discharge the debts with his own property Com Dig 231. 1 Ch Cas. 190-7.

If the estate of this Ward is mortgaged it is his duty to apply the profits to the payment of interest and for the same reason 2 Com 231 2 Bl Wm 1 Ver 246.

A guardian has no power to sell the money of his Ward in real property. 2 Com 231.

But if he does make such an investment and takes a deed in the name of the infant the latter at full age may keep the estate & take the money at his election but if he turns the money he cannot recover back the estate to the guardian and his knowledge will be considered from the date 1 Ver 435-6.

If the bond in such case dies without making

an election his exec. shall have the money, his heir cannot have the estate, for it is personal intestate made personal, but the ~~the~~ ancestor died not after it matured nor can the heir have his election for that was entitled as personal to the wife (the ancestor) Plow 403, 405. 2 Com 231.

In general the guardian is accountable for the money is required to pay only the principal and the interest but if the money ought be guardian ordered to be appropriated in a particular way, as directed in the public funds and the guardian applies it in another way or improvident trade the lord may have his election of the annual interest or the profits of the trade 2 Com 231-2. 2 Ver 629.

As to the marriage of the ward the Chancellor exercise an authority never admitted by our Courts, for he forbids marriages without the consent of the guardian and if the guardian does consent but the marriage is unequal the Chancellor will forbid it, and will permit for contempt all who assent to such marriage after the prohibition 2 P. Wms 111. 582, 1 Ver 160.

So also it is said that if strangers by an application of his marriage to his disadvantage tho with the consent of his guardian, the Chancellor will forbid it and even seize the person of the ward of marriage, and further will if necessary compel the guardian of the infant not to give the marriage 2 P. Wms 112, Atk 58. 3 Atk. 304.

I do not know that the authority in the last case has ever been exerted when a parent was the guardian but

I doubt not but in extreme case it would exercise it.

The power of a guardian over an female ward is said to be determined in her marriage and if the husband in the marriage is of full age the guardianship over her, is lost under case mod Reg 91

In the three kingdoms a male ward emancipates the guardianship over his property, estate and his legal incapacity continues the same till of full age except that he can contract for necessaries for his family

Settlement of Infants

At common Law a settlement is acquired by birth. The place where a child is first known to be is prima facie the place of his settlement. i.e. it is deemed to be his place of settlement until another is shown. 1 Bl R 362. Carth 433 Comb 364 Salk 485 1 Ld Ray 567.

And it has been observed that is generally the place of a bastard settlement but not always as if found is practised on the parish where it was born or that the mother was a vagrant 8. 1 Bl R. 362-3 Salk 427.

And in all cases of neither father nor mother have settlement in the realm the child is settled in the place where it was born 1 Bl R. 362-3. Carth 433. Comb. 364. 2d Ray 567

But in the case of legitimate children and under law of illegitimates also this presumption may be rebutted i.e. it may be shown that the place of his birth is not that of settlement and in Eng. in some cases this holds of illegitimates. 1 Bl R. 363.

Settlement by birth then is considered in the nature of a presumptive settlement which just rebutted is

conclusive, but it may be rebutted for settlements may be acquired by prescription.

The settlement of the father a maintaining parent is that of the child 1 B&P. 363. Salk 528. Le Roy 1473. Rex v 02 5 T.R. 112. Burn Lat Ca. 370-2. 5 Day & Doug 169. 3 Ey & P. 600.

This rule has in Eng.d no to legitimates only 1 B&P. 362-3.

Settlements thus acquired are called "derivative settlements". 3 T.R. 116.

The settlement of legitimate children not regularly ensure follow that of their parents. If the father acquires a new one, it is immediately communicated to the former by operation of law. 3 T.R. 114, 116 4 id 118. 3 Esp. R. 1 Stra 438, 831. Burn Ca. 3, 4. 38, 49, 64, & 76, 477. Le Roy 1473.

After the death of the father their settlement equally follows that of their mother, (in law).

But in Eng.d the rule is otherwise, since the widow having children by her former marriage marries a second husband, if she remove with him to his place of settlement the settlement of her children does not follow that of her and the reason that the second husband is not bound to keep just them of consequence they gain no settlement there since then the last settlement of the mother previous to the second marriage is the settlement of her children by her former marriage called 8th Doug. note.

By the acquisition of a new settlement the old one is lost and by no other way can it be lost, for no person can hold two settlements at a time tho he may have all the requisites of a settlement in any number of towns or parishes 1 B.R. 363.

Cole 528-9. Rose Cas. 370.

An Infant in Eng.d may under certain circumstances gain a settlement of his own by "emancipacy" and then lose his derivative settlement. It may be he just apprentice but under what circumstances depend on that Land. The reason is when he obtains a settlement for himself it will be an emancipation. If he is no longer a servant in his father's family. 1 Bl R 364. 2 Ld Ray 567. 3 T.R. 16. 356.

After a child seems to be emancipated in law as belonging to his father's family in the character of a servant he cannot take a new settlement acquired by his parents and their sons therefore he continues to live with them. 3 T.R. 16. 355. Ca. 438. 831. 1 Burr Settlem 270. 638. 800. 5 T.R. 77. 5 in 583. 1 Nels 183 1 Bast 526.

How may a child be emancipated

1st His effected by full age. He then ceases to be an infant and is free from all parental control. Burrill Cas 270. 1 Nels 183. 3 T.R. 356. if he chooses.

2d By marriage; for he enters into a state and contracts a relation inconsistent with his remaining in a subordinate station in his father's family thus necessarily freed from the control of his parent and if so, emancipated. Ca. 438-831. 5 T.R. 583. 3 da 116 Burr Set Cas 270.

3d His emancipation may be effected in giving a settlement of his own as in the case of an apprentice. 3 T.R. 356.

4th It may be acquired in general by embarking any

relations inconsistent with a subordinate station in his father's family i.e. under the government & the person as in the case of a soldier (Burnett Lev 638. 3 K 114. 116. 350. 5 id. 247. 8 id 477. 5 id 350.

But the rule that minority is emancipated by attaining full age admits some qualifications. The rule does not mean that emancipation is a consequence of attaining full age and as a matter of course, but that it may be acquired on attaining full age. For if the party after full age continues in his minor subordinate station in his father's family i.e. a servant under the care and good of his father he is not emancipated by full age and without a deed and the reason that full age was used regularly exist in this case.

In the voluntary relinquishing the that the being freed from which constitutes his emancipation. Full age enables him to emancipate himself but if he does not he is not of course emancipated.

But Lawson that if the child remains in his father's family as a servant or lodger, that is in it emancipated for such a case takes in fundament of a parent (Shaw cases 6 Yk. 2 Ed. 5 Ed. 526, 2 Ed. 2, 76.

"A settlement may be acquired by marriage" In the marriage the settlement of the husband is communicated to the wife and her former settlement is so lost or cease. The reason of this is from the law which prevent the coverture of the wife but she may have some settlement and in this so long her husband is living she is bound to do it is not sufficient

that his settlement should be hers, and so it did. [illegible] 113 Mk 363. Stra 544. Bur Le Cas 162 371, 129. Lolk 528.]

But it has been decided that if the husband has no settlement or if he is an alien he is deprived during the coverture but revives on the death of the husband. Stra 544, 683. Ex Burns Settlement Cases 192

The case is Rhymand is as follows

A Woman having a settlement
Married a man having none
The husband was he being dead
Of that the Lord was gone
Quoth, he John Doe his settlement
Her husband does remain
Living the husband but dead
It doth revive again.

But it seems this rule to the contrary notwithstanding that if the husband having no settlement does not reside in the township or being in the township neither with the wife or provide for her. Her maiden settlement continues

Indeed the Court now hold that if the husband has no settlement the wife is not dispensed. Burn Le Cas 367, 370, 371, 128, 373.

When the husband has no settlement, then she is deemed as entitled with him to her maiden settlement this depends upon the principle that her maiden settlement continues until she acquires another. Burn Settl. Cas. 367, 371-2.

Mr Webb says. Mr Grace Gold argued this in his last section in Dunsford Reports in the 7th Vol. 524.

Feb. 14th 1824.

Jo.

Master and Servant

"A Servant" is one who is subject to the personal authority of another and he who exercises this authority is called the "Master" This is called in contradistinction to civil authority

This authority is generally created by right of some contract and by the Com. Law is the only manner in which it can be created. We have a species of bondage in this country which is created without that right

The different kinds of Servants are.
1st Slaves — 2d Apprentices — 3d Menial Servants.
4th Day Laborers. — 5th Agents of every kind —
This last is of a comprehensive kind including Factors. Bailiffs. Brokers & Stewards. Ship Masters, &c &c. All these classes are known to us but the first is unknown to the Com. Law, 4 Bl Rk 423-7. 1 Roll. Ab. 464. 469. That slavery is unknown to the Com. Law see 1 Bl Rk 424, 1 Salk. 1. Still it was a species of civil authority and I never saw but it decided except in Philadelphia.

Slavery. This exists in most of the States. It has been contested whether it has ever been recognized in this State, but if this then can be no doubt, it has its origin. It is entirely civil and the same may unquestionably be said of every state in the Union but one, where it was created by the Com. Law.

In Eng. the moment that a slave states his foot upon her shores he is free, so long as he remains within the realm and is entitled to the protection of their laws, as a freeman to. This was the point decided in Lightfoot Cal. R. 424.

Under the feudal system there were what were called "villeins" not slaves in the full sense of the word, as under the ancient Greek & Roman law, but were still the proper sense of the term.

So tho the law did not allow the holding or maintaining them yet they were in a state of absolute servitude this species of slavery arose from the villein tenure, & also to this because the law on this subject may be analogous to the rules and customs in this country regarding slaves. Lit. Sec. 181. 194. 204. 2 Blk. 94.

There has been no such thing in Eng. as a villein since the tenure which constituted it was abolished at the restoration Geo. 8.

Slavery was never authorized in this State by the ancient feudal law, neither was it by the Constitution tho that slavery was unknown, but it originated from an local law. for tho we have no State authority it, yet we have State courts upon slavery as a fact established as among various others, the State possessing the mode of emancipation, and it is extraordinary to say that it was never legislated. It has existed in point of fact and acquiesced in by our legislature.

The use of force cannot be maintained in entering away a slave. i this both by our own and English courts. for tho the law regards the rights of

of the servant his master, yet not his person so that the child cannot be in slavery. 2 Ld Ray 1274. 1 Salk 666. It was held at a certain period that it would lie. 3 Hub 85. 2 Lev 201.

But since the doctrine established in Eng that the moment the slave touches land he is free while there, if a slave is carried away from his master the latter is entitled to the same as if he had lost an apprentice in the same manner which is an action with a pecuniary damages. 1 Salk. 66.

It has been held in one State that a slave may hold property and recover it by suit by his next friends. It has been also decided that the marriage of the slave with the consent of his master is an emancipation. I doubt whether this is adopted in any other State, the reason assigned by our Court is that the slave has contracted a relation by marriage inconsistent with servitude &c. when done with the masters consent.

For the Feudal law regarding the marriage of villeins vide 1 Litt Inc. sect. 187. 2 Blk 93-4. and the consequence of our marriage with a freeman in her Lord vide Perk Sec. 314 Co Litt 123. a note a. 136. b. 137. b.

It has been matter whether an illegitimate child born of a slave is by birth a slave.

By the civil Law the issue of a female slave was a slave i.e. followed the condition of the mother. But by the Can. Law the condition of such issue followed that of the father only, and as the intent in contemplation of Law was no farther, it follows that

an illegitimate child born of a slave is not by birth a slave for it cannot follow the condition of its mother unless of his father for he is not known. Lit Rec. 188. 2 Blk. 93-4

This State has adopted by practice the law of the civil law and I conclude the same is now in force in this State. Lit.

Provisions have been made in this State to abolish slavery and now by lapse of time it is almost unknown

The importation of slaves into the U. States is prohibited by law of Congress. many States have a like State Constitut. also forbidding the bringing of slaves from other States into her own State.

Respecting the question of the right of slavery it is agreed by all, viz. that offenders of the Law by the operation of Law may become slaves, as a sentence to the penitentiary &c.

2d Apprentices " They are called apprentices from the French word "apprendre" to learn, for they are bound to their master for the purpose of receiving some kind of instruction, tho this is by no means always the case. The most usual is that of being bound to some mechanical art & trade, but one may be bound to a merchant or husbandman or to a Capt. or to the head of a family &c. Where the name does not depend upon the nature of the employment so also he may be bound to a surgeon, attorney or to one exercising any other employment 1 Blk 426

By M. T. 5 Eliz. every apprentice must be bound by deed or indented instrument and any contract otherwise made is void

It is supposed by many of our writers among whom is Sharpe that this was a rule of Com. Law. but the opinion is incorrect for before this Statute one might be bound as an apprentice by parol contract. - 5 Mod 182. La Roy 1117. Salk. 68. 3 Keb 304. & Bac Ab. 492.

Connecticut has adopted this Stat and holds that no contract of apprenticeship is good unless under seal.

If specific contract of apprentice ship cannot be construed into a serving from year to year or by the year. or into a hiring in any other way for if it is invalid as such it is invalid as to all purposes 8 T.R. 378.

The Stat of Elizabeth does not declare in express terms that (no contract of apprenticeship is good unless under seal,) every sheet of apprenticeship shall be a good upon in writing under seal but says that if it is not so for such and such purposes the contract shall bind. but the Courts by construction have held that if it is not under seal it is good in no instance.

It is laid down in some of the Books that the relation of Master and (Servant) apprentice does not exist unless the latter is expressly named as such in the indenture. Bacon Ab. 3 Bac 546. 1 Mun. Ent. app. But this is overruled in the case of 8 T.R. 379. Peake 53-4.

All other servants may be retained by parol

By Engl. Stat paupers may be apprenticed out by the overseers of the poor with the consent of magistrates see have a similar Stat.

All servants are legally entitled to wages for their services and when there is no express promise the law will imply one except in apprentices 1 Bl. 428. 8 T.R. 379.

Apprentices may be entitled to wages by express contract for that purpose if the indenture, the sole evidence, be silent there is no express contract the law implies one, 5 T.R. 379.

By Stat 5 Eliz It is enacted that minors may bind themselves in an indenture of apprentice, &c. so that an infant in this respect may bind himself by deed. But it has been uniformly held that the infant is not bound by the covenants in the indenture. For the Stat does not take the privilege of infancy away, by requiring that he shall be bound by his covenants. Hence he is not bound for the benefit of infancy cannot be entitled by implication. The only point of the Stat then is that to bring in the minor an apprentice de facto" the parties respectively enjoy the rights incident to each, and each is subject to his respective duties. But the infant can avoid the indenture if he pleases by breaking the covenants 1 Blk 426 Co 2. 149 148. Co Ent. 499. Doug 501. & 518 Salk 170. 5 Mod 316

We have no such Stat in Connect. in Connect.

But if the Father or guardian join the infant the former is bound by his covenants and by Engish law or Stat he is bound also for the breach by the covenants of the infant for the term of his life and if the Father dies not the master has remedy Doug 501 Ent. 518. Salk 170.

By the Supr Court it appears that the indenture is in the common form not containing any novel covenant on the part of the Father respecting binding him off for the performance of the duties of the apprentice by the apprentice it is recited that

he is not bound if the apprentice violates the covenants but if he shall find in the succeeding covenants "I bind myself for the due performance by the said A.B. of all the matters to be performed by him, he is then bound 2 Mass 228.

This is an instance I have seen accordingly and under this rule a master would seldom have a remedy for such a sweeping claim is very unusual.

When Masters are bound by parish officers, as overseers the latter do not covenant for they act for the public in an official capacity, and it would be unreasonable that they should bind themselves 1 Doug 500. 518. n. 1. 1 Burr Justi 89, 85. 90

As I have said a contract must be entered into by deed. But there are many cases in which an apprentice is, instead of leaving his master or "for misconduct in the master - this means a series of misconduct not occasional abuse, and if he continually neglects to give him suitable food or lodging or is in the habit of punishing him unmercifully 1 Ch. 518. 1 a 2 Bl R 426.

But it is a rule that an apprentice cannot be discharged but by accid. nor how can this be accomplished to the Court will, for minority is a discharge and yet it is no defence 2 Ld Ray 1117, Tabitot. 6 Mod 182. This rule arises from the gen. maxim that every contract must be dissolved by the same solemnity with which it was created. The ground of the rule here is that he cannot be discharged by an unassented agreement

which it is by deed. i.e. he cannot be discharged by a parol contract if that is executed. The rule is that he cannot be discharged by any thing pr. the nature of a contract unexecuted which it is under seal but he can by various ways, As: if the master says to his apprentice you may leave me but Estella, the apprentice cannot leave, but if he does not leave and the apprentice leaves he is discharged for this is an agreement executed. This is holden by the Supr. Court of Connect. and Lord Kenyon says "the relation of Master and apprentice may clearly by mutual consent be called into effect but undoubtedly if revoked before execution it is not a discharge 8 T.R. 109-10. For authorities bearing on this point 1 Doug 153. 3 Ill 126. Doug 257. 1 C.R.R. 638. 1 East 619. 630.

Cancelling a deed or the indenture by the master is a discharge of the apprentice. For by the former the deed is destroyed and by the latter there is no deed Stra 582. 2 Blk. 308. 3 Burr Sett Cases 511. 274.

It has been said that the bankruptcy of the master is ipso facto a discharge of the apprentice. But this appears not to be law. it is a cause for which a Ct. of Sessions may discharge him Strange 582. 14 Mass 149. 3 Pac. 550. in Mass. Civil division. "Apprentice"

There is probably some Court in every State authorized to discharge apprentices for causes entitling them to a discharge, Our County Court has this power.

The Ct. of Sessions in Eng. may discharge either for the ill usage or servants or apprentices but there cases are confi-

sed to those where the apprentice is bound by some office of public authority. 1 Salk. 426.

It seems formerly to have been doubted whether if the apprentice married without the consent of the Master, the latter could turn the former away, but this is not now law. but in this case he has his remedy on the Covenants for an indenture in common form, contains a covenant, that the apprentice shall not marry during the term, 1 Ven 492 3 Bac. 550.

Of the Masters interest acquired: and his right to assign it. The interest which the master acquires by the contract is in the service of the apprentice and this only, the Master cannot be said to have an interest in the Physical body of the infant apprentice, but his interest is such as to give him an authority to controle his person, for otherwise he could not command his services and the contract being fiduciary is not assignable i.e. he cannot assign this interest in the apprentice (commonly expressed that he cannot assign the apprentice) for his right is founded on a personal trust reposed in himself — and by the Com. Law personal trusts are never assignable. 12 Mod 553. 1 Keb 250. Hob 134. 3 Keb 518. Salk. 68. Doug 69.

If a submission by all the parties to the indenture should be made to arbitrators, and they should award, that the Master should assign, the award as to this would be void unless consented to by the adverse party. Sta 1267.

But tho an assignee cannot take the masters interest, yet the assignee implies a covenant or agreement, and binds him (the master) in favour of the assignee it is not necessary that such covenant or agreement should be expressly so di

implied in the act of assignment by their covenant the assignee renders himself liable to the assignee if the apprentice does not serve him, and this is extreme with the apprentice whether he and serve the new master or not. If the apprentice does ... serve the assignee he is an apprentice "de facto" and acquires all the rights of an apprentice and incurs his liabilities & duties. So also of the assignee he has the controll of the apprentice and is entitled to his service and incurs all the duties of a master in such relation. The apprentice also can gain a settlement as if he served under his old master. Salk 68. 1 Mod 96. Doug 69.

As the master cannot assign, neither can he find him abroad to complete his trade unless there is an assignment for this purpose, or the nature of the business requires it, in which case it is warranted by the terms of the indenture this depends on the consideration that his trade is personal & the contract fiduciary. 6 Mod 236, 12 Ab 446. Holt 134, 5.

Upon the same principle in the decease of the master the apprentice cannot be retained by the Ex.r or Adm.r for a personal trust is no more descendable than assignable and the reason that prevents his taking advantage of the justness Salk 68, Stra 1267, Salk. 68, 2 Ves. 35.

But tho the Ex.r or Adm.r cannot hold yet it has been determined that they are bound to treat the apprentice with kindness are mere directions 1 Ves 177, 1 Str 216. This is an unreasonable rule and has been overruled in 2 Str 1267, and Lord Ch. says it is no longer regarded as law. And indeed it is opposed to the principle that the trust is fiduciary, and further if there the law requires of him (the Ex.r) to interest, but by the

general rule. it takes from him those necessary authority over the apprentice requisite to discharge such duty

Whether the Exec.r or Adm.r is bound by the covenants of his testator or intestate to furnish the apprentice with necessaries. is a question on which the authorities are divided but the weight of them I take to be in favour of their liability 3 Salk 41. 1 Ld Ray 761. 820. 1 Str 216. Cro E 523. 1 Day. 30 & 87

This question does not stand upon the same ground as the former. since in effect it is not a covenant for it is one which any one is capable of making. it is a point that furnishes an agreement on both sides. and it is to be presumed that the consideration of the covenant on the part of the apprentice is that the necessaries be furnished by the Master. Another opinion is that it is his own duty to make such a covenant.

It seems in a case reported in Day. that the Court would take a distinction between covenants binding himself and his Ex.r expressly & those binding himself alone. but this can make no difference. for all personal contracts not fiduciary bind the Ex.r or Adm.r whether named or not. for they are always implied.

There are some cases in which the rule appears to be overall or rather this doctrine will be when a premium is given to the apprentice. then the premium contemplates the necessaries during the term as well in the instruction and the necessaries is a part of the consideration for the premium.

In such case where the Master dies during the term. they may order a part of the premium to be returned and this is usually done when the mast.

happens in the first part of the term, when in the latter part of the term it is not so usually.

The Courts have gone to great length on this subject — for when the indenture was made, providing that on the death of the Master such a part of the premium should be returned. The Ct. have nevertheless most strictly adhered to a return of more. 1 Ver 466. 1 Atk 149.

I am at a total loss to conceive the reason of this provision. So also when a master turned away his apprentice, Chy Chan ordered a return of a part of the premium 2 Ver 64. If he becomes a Bankrupt & abandons his occupation Chy will decree as above 1 Atk. 149.

And in Eng. the Courts of the Ct of Kings when they discharge an apprentice have been in the practice of making a calculation of a part of the premium. How they came by their authority I do not know. but conclude that it was first exercised without authority, and sanctioned by long usage 1 Bulk. 426. Salk. 67 a Cy. 11. Mod. 116, a 116, 1 Chan 314.

The right of a master to the services of his apprentice is more more absolute than that to the services of any other servant. for whatever an apprentice acquires by his labour is the property of his master. but a days labourer has no more acquired of their than a days work. and should in his course hours acquire property it is his own.

If property by an apprentice thus acquired is not paid to him, the master after a demand and refusal may recover it from any one who owes it by action, and if it is delivered to the apprentice he has his remedy in the same way of trover 48. 83. Cutler 69 a 11

"An apprentice-this 'de facto' will support this action Salk 68 6 Mod 69.

If the apprentice carries a vendible chattel the master after demand & refusal can recover it in trover with against the apprentice or whoever has it in poss. in assit.

This rule holds the the apprentice takes without the master's consent and against his orders, for otherwise regardless with or without his master's consent, if he takes it his master Ver 82, Stra 582, 12 Mod 415, 6 Ed 69 Salk 68.

If any other servant enticed away during the time of service the master cannot claim them as his own, but if one has employed his servant against his consent, the employer knowing him to be a servant, a. of A. A. has his remedy in an action with a "per quod" Co Jn 653, 2 Lev 63.

If an apprentice or other servant is enticed away from the master the latter has an action with a "per quod" Cowp. 56.

And the rule holds of journeymen also, for they are for the time being servants and that the they work by the piece for this is but a mode of computing wages, Cowp 56. 1 Wm 309.

It is said there for taking away forcibly the servant trespass lies, by the master, but if enticed away "Case" lies. I confess I do not see the reason of this distinction for it would be trespass in the case in both instances, for the forcibly taking away is the proximate cause in each a beating of the master his damages are consequential only and for this case lies only. Hob 125, La Ray 107, Salk 380.

What case is the proper action Hob 2 C.B. 107, La Ray 1132, 1 Cowp 55 Then is a case for which Demand account, when trespass was maintained for enticing away a servant. But it is impossible that this should be Case. Cowper is an accurate

deposited and it is unaccountable how this case should have escaped his notice.

In Eng. an Apprentice by Stat. Law gains a settlement by residing in the parish forty days. but with us no minor can gain a settlement 4. Day. 189.

We have a dict that if a minor apprentice runs away from his master, when of full age he is liable for the damages which his master might have sustained by the departure, this is an instance in which a man is bound by his acts when an infant.

3rd **Menial Servants** are so called from being employed "intra moenia" and are usually distinguished by the term "domestics" 1 Blk 425.

At Com. Law if one was retained as a menial servant without limitation of time the retainer is construed into a hiring for a year, 1 Blk 425. Id. Hob 168. This rule was never established with us and in this particular the usages prevailing, the law to us.

4th **Day Labourers.** There is no rule of the common law relatively applicable to this branch of servants, by a day labourer is not meant a hiring for one or two days in particular but for any period of time however long or short, 1 Blk 425-6.

5th **Agents** This a generic term comprehending a great variety of servants. as factors, factors, stewards, bailiffs - ships masters & attys.

They are servants in relation to their masters property & quoad hoc are servants. but in question 1 Ward 469. 1 Blk 427. Stat 252. 277-8.

The principle has not the same control over their accounts as he has over servants in general. They are not subject to his domestic government, and are bound to act for him only according to the terms of his contract. And it must be new doctrine, that an attorney was subject to the domestic government of his client.

On this subject there are several rules, important in their application.

Every factor or broker or other mercantile agent ought strictly to pursue his commission in compensation for his own take, as well as his own because bound to do so by the law. If he does so he is not bound for loss, but if he deviates from this he is liable. Com Dig. Merch. B.

A factor is a commercial agt. in a foreign country. A Broker is one trading in the commodities of his principal and is a domestic agt.

Every factor has a lien upon the goods of his principal in his hands, as security for any balance of account in his favour between himself & principal. He has a lien not only to secure his commission on the specific goods in his hand but for any previous good on which commission had not been paid.

But if goods are specially lodged with him for a specific purpose as to be delivered to A.B. or to remain in his custody, he is as to them a depositary and of course has not the privilege of a factor over them. 6 Vin. 258. Com Dig 108 N.Y. Ed 206

In the gen rule that he has a lien vide, Amb. 254. Burr 493. 3 Wils R. 115. 1 Ld. 104. 1 East. 4. 335. 2 Ld. 227. 523.

But by yielding up the possession, to his principal he loses his lien forever. For a lien supposes personal property founded in possession, and it would be a solecism to say that one had a lien upon personal property without having the possession (in law.)

If a factor effects a policy of insurance upon the goods of his principal he has the same lien upon the policy that he had before upon the goods and if a loss happens he can compell the underwriters to pay him the policy and if they pay it to the principal they can be compelled to pay it over again to him. Montaranu 141, 1 Burr 494.

He has the same lien upon the price of goods sold by him, as upon the goods and can compell the vendee to pay it to him and if he pays it to the principal he can compell payment over again. This doctrine depends upon the law merchant, Comb 251, 256.

A factor has no lien upon the goods of his principal unless they come into his actual possession — an immediate right to possession which is called a constructive possession, is not sufficient to give a lien — As if the principal assigns goods to the agent, and forwards a Bill of Lading, if the goods are stopped in a post the agt. has no lien they must have reached him 2 Vn 117, 1 Atk 134, 3 T.R. 119, or come into his possession.

By "lien" is meant an incumbrance by one upon the property of another as a security for some debt or duty.

If a factor gives more a pecuniary lien than his commission constitutes him, his principal may dispute

the purchaser. But if the factor purchases more than his com-
-mission warrants his principal cannot except against the surplus
or claim the purchase for the greater it contains the loss for
which he is bound. — If the factor sells for a price less than
is warranted by his commission he is liable for no more
as principal can be bound by the acts of his agt. any further
than he has authorized him. 1 Terry 510. Com. Dig. Mercht. B. 2.
2 Mod 100.

And the rule that he is liable if he sells for less holds
it is said even when the goods are perishable and he
would lose a loss sales than at a reduced price. But the rule
is now denied and it seems settled that he, must comply
he can sell for less. This dispenses with the contract
between the agt. & prin.l that the former shall sell but for
such & such prices. 2 Mod 100. Beams Com. of Com.t 236.

It is said if a factor sells on credit when
he is not warranted by his commission so to do he must
bear the loss if a loss is sustained, 2 Mod. 100, 1 Bulst. 13. Wilm 432.

But this rule is denied by later opinions, ob-
-ter however) and if said that he will not incur a loss
unless expressly restrained by his commission not to sell on Cr.
for if the Com.t does not authorize him and yet does un-
-justifiably restrain him he is not liable if any loss
accrues from the sale on Cr. 3 B & P. 489. 11 East 406. 1 Com on Com.t
236 1 Esp. 258. 6 Johns 69. 8 & 9.

But I am inclined to think that the rule adjusting
the practice is still correct, and that, unless it is the usual
practice where the factor is located to sell on credit, and in all
the cases on the subject, the usage of the place of the agent's
location will govern the practice.

There is a certain kind of commission, authorizing the practice of selling on credit called "del credere" but under this commission he is always liable for the payment 1 Vez. 116. 3 Bos & Pul. 497. 1 Camp. 444.

A factor has no right to pawn the goods of his principle for his own debt, and if he does, the principal may after a demand of the pawnee sustain trover against him

In some of the Eastern cases on this subject it was intended that before the Plff sustained his action he tendered to his factor all arrears of commission if there was any due. But in other cases, this has arisen out of the abundant caution of the principal, but since then courts the principal has without such tender supported the act of pawn of the pawnee, and the tender is not necessary, for the pawning is (not) a breach of trust, 5 T.R. 604. 606, 1 B & P. 648. Stra 1178, 1 H Blk, 362, Cui Dig Mast Lee, & Esther Merch. B. 3.

The reason why a factor cannot pawn his principals goods for his own debts is that his lien is a personal trust which he cannot transfer, therefore the act of pawning was a breach of trust. But I can see no reason why he cannot pawn his principals goods for a debt of his principals, for it is in accordance with a gen commission but on this I have seen no decisions

But it is said that he may pawn the goods as the goods of his principal to secure a debt of his own to the amount of his commission provided he authorits the pawnee his servant to keep the goods for him (the factor) in this way he may avail himself of the lien for then intended the pawnee is but his servant, and the act is no more a breach of trust than if he had appointed his own clerk to take them and secure the commission. Then also the factor is

both liable for himself and creditor and the Creditor as servant is liable also for his misconduct - 17 Ewt 5, Vs the factor.

But this he cannot plead yet he can sell them for sure an act is merchandise and this is his business for merchandise consists in buying and selling 1 H. Blk 82 362, Cowp 256, 7 Ex 359, 1 id 112, 2 East Dig 493.

But upon what principle does a factor sustain actions in his own name? for this is not possible with any other servants except mercantile ones. The reason assigned assigned is that he has a beneficial interest in the contract in the contract, i.e. his commission. but this is nothing more than his compensation, but all other servants have compensations, as if I put a hole into the hand of B. to sell giving him not a pecuniary commission and he sells for him. I alone can sustain the action. I take this not to be the true reason but believe it to be this because the sale is made in his own name. 1 Ex 112, 10 East 5, 2 East Dig 493. N.Y. 204, 1 H 13 Blk 82. 362. Cowp 256. 7 Ex 359.

Not only factors but all brokers may sue on a contract made in the name of their principals, in their own name. for the person is either expressly or implied to pay the broker. and must merely in sure contracts the purchaser knows nothing of the principal, viz. agent. Park on Packs Pr. 403. 1 East 5.

The same rule holds of an "auctioneer" he may sue the highest bidder and notwithstanding he makes the money to whom they belonged 13 Blk 81. 26 591. 592.

When the principal is not in sight to the agent. if he gives notice to the purchaser to pay to him. the purchaser is bound by the notice and must pay to him

at his pleasure, but otherwise if he is indebted to the factor, as before described Stranz 1182. Bak Dig 107. 1 Ld Ra 204. Cowp 251. 255. 2 East 227. 3 B & P. 495. 1 Comp 444 & Comp. 444

But when there is no action due the factor, the principal or factor may sue, and he who first brings the action attaches to himself the ... rights & property to Judgt 1 H Blk. 81. 7 East. 359. 360. n a. 1 Chit R. 5.

An auctioneer is not in gen bound if he sells to the highest bidder tho for a less sum than warranted by the order of the principal. for the very act of setting up goods to auction amounts to a contract with all the bidders. Nine they shall go to highest bidders, and when goods are set up in usual form the invoice so be sold and the highest bid makes a complete contract.

But if the principal ordered the auctioneer to set them up at such a price if he sells them under he will be liable, Cowp 395.

The rights of liens extend to some other agents besides those of factors. as Attys an atty has a lien upon the papers and judgt of his client and may detain the adverse party to pay to him the costs such party is found to be entitled. but this rule does not hold of court. 1 Ld Raym 24. 122. 217. 657. 2 Ld 440. 587. Doug 100. 238. 2 Blk R. 826. 4 Bk 123. 6 Ld 456. 8 Ld 70. 571. 1 East 404.

But this right of an atty is subject to any equitable claim that the other party may have against his client as if he has an equitable title the atty's lien is subject to such Equity if such, and this because he can have no higher rights than his client

An atty who executes an instrument for his

principal must act in the name of the principal and not his own. For as in the former he was a mere tool of his principal, so in the latter he only binds himself the usual signature by adding "A.B. L.S. by C.D. his attorney." 9 Co. R. b. Stra 505, 955, Ch. Bills & Pr. 247, 56, 75, 1 Ath. 181.

But that this mode is not indispensable in that other modes will answer. 2 East, 142.

There are further rules relating to the execution of instruments by agents for which see Tit. "Deeds."

An agt. contracting for government as such in the name of the government is never personally liable on his contract. This is not an exception for he agt is liable in his own name when acting in the character of an agent and exceeding the scope of his commission.

But there was an supposition that a difference between an agreement of Govt. and one of its individuals; but this is a mistake 1 Ath. 674, 1 East, 582. On this subject and a case in Council Title Agent, & Comb.

In the case of a public agent his principal was not liable as it is true. and from this it has been inferred that in such agreements the agent must be liable. but the remedy of the Cr. of Govt. is by applying to Govt. and the law presumes (and this presumption cannot be rebutted) that such justice will be done.

Rules in general relating to Master & Servant

And 1st. When the master is bound by the acts of his servant as in the same and when he can take advantage of them on the other.

The acts of the servant by the master concerning which express or implied are in legal judgt. the acts of the master.

"and hence appears the maxim, qui facit per alium facit per se"

What then are their acts express or implied? All the acts in the business in which he is employed by his master are deemed to be done by the order of the master either express or implied 1 Blk. 429, 2 H Blk. 442.

It follows that whatever he does by the express order of his master is 2° whatever the master expressly permits him to do in the course of his business, or 3° whatever he does within the general scope of his discretionary authority, is the act of the master because it is by his authority either express or implied.

A servant being legally authorized makes a contract as servant, such contract in legal policy is made by the master, and in pleading it is alleged as the act of the master and no notice is taken of the act of the servant. If then a servant master a promissory in the name of the master the latter is liable on it in an action by (the "promisee") 2 Str. 911, 3 Burr 559. So a promise of a promise is made to the servant as such it is a promise to the master and will support an action 2 N.R. 311 or in net.

If a servant is cheated of his master's property the latter may recover it if it is of money he can maintain, ind. assp. Bull on Nisi 98, Cro Jac. 223.

If a servant is robbed of his master's goods in the absence of the latter the master may maintain an action against the thief Salk 613, 3 Mod 289, 4 id 303, Nel 8, 12 id 54. The remedy of the servant maintaining the action is on account of his liability over to the master for the property thus taken from him.

But this is certainly incorrect and by no means the true reason, for the servant is not liable, the robbery is a good one. This rule was adopted when the law of bailments was imperfectly ascertained but it is now well settled that a depositary was not liable for such accidents, the true reason is, that the servant is the true owner of goods as to all mankind except his master. The law of plunder settles this — and it is a rule that he must declare upon them as his own goods hence he cannot be regarded as the owner. 2 Saunders on Lemon 379. 3 Mod 287. Salk 613.

Both cannot maintain the action he who first commences has a right to prosecute to judgt and an action by one abates a subsequent one by the other. Latch 127. But if the robbery had been on the person of the master it is a trespass against him. Here the servant has no poss. either from his master, but in his master's absence he has a mixt and entire poss. and this last case there is no reason for the servant to sue. Salk. 613. Carth. 145, 1 Hawk. 148.

If the servant parts with his master's property on illegal contract the master may recover it by action if it was money, in an action for money had and received.

But if he squandered it away upon legal contracts if there is no fraud practised, the master cannot in any possible manner recover it, and it is conceived that he trusts and commits, and the servant, applies "That where one of two innocent persons must suffer must suffer by the act of a third, he who enables the third person to do the wrong must sustain the injury 3 Burr 557.

This rule implies the contributory legal & resistible of fraud. Vide title "Bailments" for the class of servants called "Bailees"

If a servant does any unlawful act by the command of his master both are liable. If the servant is bound to obey such command as all just and lawful yet he is not obligated to do more nor can he be justified because commanded by his master. 1 Wh. 430. 1 Wh. 328. Cath Dig 330, 488.

But if in obedience to his master's command he innocently becomes instrumental in a wrong he is not liable but the master alone. as if the latter had unwarrantably confined a man and gave the key to his servant ordering him to keep the person confined, the servant in obeying the order is not guilty of the wrong hence is not liable 3 Bacon 566, Tit. Master & Servant.

This rule applies only to acts which are in themselves harmless. as in the last case the taking of the key in itself was a harmless act, and the case presumes him to have nothing of the right or cause of his confinement. But when the act is unlawful the case is otherwise, and tho the servant may not be conscious of its being an unlawful act, as if I order a servant to enter a lot which I claim to be my own, and take a crop. the servant enters accordingly and takes it away he is liable with me as actual trespasser and we are both principals. for in trespass there are no accessories, and in the civil action for damages the civil intention of the servant, or of no civil, for in making a civil redress the law does not regard the intent but the injury committed but if he be prosecuted criminally the intent should have been considered. 2 Blk. 892.

The acts of the servant not done by the master command or order either express or implied are not considered the acts of the master hence the latter is not liable. Thus if a Serv.t acts without the authority of the master either express or implied or not within the general scope of business with which he is entrusted he cannot be said to have acted for his master 3 Salk. 282. 1 Salk 431. 8 Mk. 533.

Thus if a servant while labouring in the field abandons his business and beats B. & out of the scope of business of his own accord makes a contract for his master, the latter is not liable in the one case and in the other. In both are actions the law of the Serv.t duty hence are not his acts or servant. and if to his master is not liable. On this principle it has been held that if a servant, while in the discharge of his master business commits a tortious injury on a third person the master is not liable for this is not in furtherance of the master business. Thus if the servant of a team wilfully his carriage against the carriage of B. the master is not liable. So if a Carman thereby drives on the cart hence a person of another he is otherwise liable for the injury 1 East. 106. 1 B & P. 472. 1 Salk 441. 3 & 5 Mk. 702 2 Mk. 154. and cases there cited 465 but is not liable the was done upon before any of the cases cited to be overruled except Salk.

All such tortious acts are distinct from the master service and if matters not otherwise he uses his master carriage, horse, or vehicle, to do the injury or otherwise he does it by a stone, or with his own hand he cannot be equally liable, but had the accident happened thus the case stands, if the servant

while in the discharge of his master's business the latter would be liable. One reason assigned is that he must answer for the misdeeds of his servants and if he employs an unskilful one it is his own folly but the law goes no further it does not require him to be answerable for the frolics of his servants, and if so no reason would be said. Who have a servant for an hour's time he might pay the acts of his servant be business? However this distinction does not depend upon the point of expediency, for there is a radical distinction for in the latter instance he is in the discharge of his master's business, and the injury arises from an careless or unguarded discharge of it, and it is the master's business nevertheless whether wilfully or unskilfully discharged. The acts of the servant are those of the master, even the servant as with one and as servant. But in the former the wilful injury was not on the part of the servant in intendment furtherance of his master's business, neither was it in pursuance of it, but it is executing business of his own "quoad hoc" he is out of the limits of his master and of course not servant. hence "quoad hoc" he is alone liable 6 Ld. Ray. 128. 2 Str. 1141. 442. 1 East 106 5 Ch. 648. Thus, when a servant drove his master's cart against another and killed a piece of wine is approaching that it was done thro' neglect only the master was held liable. So when one drove against a boy under the same circumstances the master was held liable 2 Ld. Ray 441 Salk 441 Salk 739. 1 Wood 465.

So if the apprentice incurs the business of his master carelessly or unskilfully the master is liable 2 Kelly 9. 1 Bitt 451.

The Writer in the morning on this subject is somewhat novel: for in 1774, the action "Trespass" on the case" was first used

master for a wilfull injury by his servant. The Ct. held that the ac would not lie but that "Trespass" was the proper remedy but neither the court nor bar seemed to doubt but that the master was liable. 6 T.R. 125. In 1795, Trespass was held as the master for an injury by the negligence of his servant. But the Ct. held that "Case" was the proper action and that Trespass would not lie. 2 H. Blk. 442. 2 Ch. R. 446. The decision in the latter case and the reasons of it is correct, for the action is for injury of the servant in the usual course of his master business. Therefore "Case" is the proper remedy in such case. In 1800, an action like that in "94" was sett that "Trespass" which the Ct. then required was held instead of "Case" and the Same Judge then held that no action would lie as the master. 1 East 106 1 B & P. 472. It is remarkable that in all these cases the decisions were right yet the reasons were wrong.

In the second it was held by the Cos. of Com Pleas that when the master was liable for an injury by his servant the remedy was "Case" even tho a fol-lable injury provided it was not done with the master's consent (express or implied*) If then a servant does a foreable injury of his own accord without the consent of the master express or implied, the remedy is vs him alone. But if he does it negligently or unskilfully the master liability is in case and yet if the servant was liable it would be in "Trespass" the reason is that when the master is liable it is on the score of negligence 2 H. Blk 442.

So the rule - that when the master is liable it is in "Case" only. There is an exception. In the case of a strict liability for a forcible injury by his deputy under colour of authority as when he tenter

*When copying this I inserted that two words within the brackets inadvertently but I mean it is correct. &c.

the goods of B. in an Exec^n. to A. The Sheriff is liable in "Trespass" the reason is that he and his deputy constitute but one officer between them, as to them there is deemed a legal unity and identity and another reason is that at Com. Law. is returned in the name of the Sheriff, but the Deputy is liable also. 2 Bth R. 334 2 Rob 352.

If a servant employed another servant in his masters business, and the second in the discharge of his business injures a third person the master is liable in "case" precisely as he would had he himself employed him 1 B & P. 404. 6 T.R. 411. It seems, from the report of this case that the servant hired the second on without direction or authority. and if so I cannot see the reason of the decision, unless indeed he had acquiesced in the act of employing the second but this does not appear from the case, But the middle person i.e. he who employed him is in no way liable. 2 T.R. 411.

And the general rule notwithstanding, if the wilful injury of the servant is a breach of contract the master will be liable. There is no decision on this point so far as I know of the kind in the Books, E.G. A servant of a blacksmith in shoeing a horse wilfully injures the foot, the servant is clearly liable for the trespass and the master is also liable on his implied contract which he makes with every customer that his work shall be done with care and ordinary work skill. this act of the servant is a violation of this contract. So if cloth is carried to a tailor to be made into a garment, should the servant cut it into shreds and utterly ruin it, no one can doubt, but what the master is liable and he is so on his implied contract 2 Bl. Rep. 1 Stra 158. Jones on Bailt 73-4. 3 Bth 165 6 Then authorities throw some light on the question.

Lectures 14.

But in these cases the master is not liable in "trespass" for it is the wilful act of the servant and not his own. Hence the servant is the one liable in trespass so that this is not an exception to the general rule. But the master is liable on his contract

A Post-Master is not liable for any damage sustained thro any of his subordinate officers for he is himself a public servant and if he improperly employs his under officers he is accountable to government.

Neither can any of the other heads of departments be liable for the misconduct of their subordinate officers for they are all servants of Government. Ld Ray 646 Coatt 764. Esp Dig 624.

Lord Holt once held that a post master was a public carrier but Ld Mansfield held otherwise and correctly too. But the Post-master is responsible for his own conduct and liable as any other servant or person so also of his subordinate officers they are and liable for their own acts or misconduct. 3 Wils 443 Esp Dig 623. Coatt 765. 2 Blk. R 906.

Liability of the master on contracts made by his servant

A master is bound by contracts made for him by his servant, provided the latter acts within the scope of their authority delegated to him by the master for in every such case the act of the servant is the act of the master

The authority contemplated may be general or special, express or implied 2 Ves 543. 643 Ld Ray 224. 3 Johns. 234. 8 Lb. 551. 1 Blk 457.

A general authority to contract is one not confined to any individual contract or contracts but is one which extends to all contracts in general or to all of a certain

kind as if a master authorises his servant to purchase necessaries of the family on credit this is a general authority

A special authority is confined to one more specific contract as if one directs his servant to sell a specific chattel or to purchase a horse and in either case the authority may be express or implied

An implied general authority is one inferred from the frequent and usual practice of the Master, not from an individual act but from a course of acts. as if one permits his servant without express authority to make the usual purchases of necessaries for the family. this is an implied gen authority 1 Bk 430.

It concerns that a special authority may be implied, thus if the Master stands by, when his servant makes a contract for him and does not disappoint it he must be deemed to give an implied special authority

If the Master has made it a practice to find his servant to purchase necessaries but always sent money by him to pay for them and never authorised him to get them on credit. should the servant get them on credit the master is not liable on the contract for here is no authority express or implied 1 Bk 430; 3 Salk 234. 1 Show 95.

But if usually or frequently allowing him to purchase on credit the master by such indulgences lends a credit with the Seller or vendor and as the case may be with the particular person he is liable on his contract 1 Bk 430.

But if he in one instance pays for what his servant contracted on credit without expressing any dissatisfaction he will be answerable for any subsequent purchases this servant may make with the same persons for it cont.

to an implied acquiescence and an implied consent for the credit to continue 1 Bl. R. 430.

If a servant unauthorised purchases goods for his master and the same come to the hand of the master the latter is liable for the acquisition in the merchantable for he may satisfy his servants by express either subsequent or precedent, 3 Salk. 234. Cro. Car. 450. Ch. Bills 26. 3 Keb. 635.

There is a case stated by Ld. Holt, to be a doubtful question viz. a servant having no authority delegated generally receives money from his master to buy some goods he buys the money & purchases the goods on the master's credit and the goods come to master's possession and from this he raises the "doubtful question" But there is no probable grounds for this liability - for the question presupposes that the servant had no authority - so that it was the creditors own folly that he gave the credit - neither was the master conscious of the fact that they were put upon credit, but had he known this he would be liable for then there would be a subsequent assent Ld Ray. 224, 5 Salk 234, 3 Mo. 760, 3 Keb 625. Yerk R. 46. 5 Geo. 76. Sir 214. Comyn Con. 221. Yet expressly the case is a good one, there is not a consent either precedent or subsequent, express or implied.

But if the servant purchases on credit by his master's authority, and the latter gives money to the servant to pay the creditor but he pocketh the money, the master in this case cannot lead the loss. & it is his own folly thus to intrust such a servant neither is the creditor in any default 5 Geo 76. Sir 221. Ld Ray 224.

When the master has permitted his servant to purchase on credit, he may at any time discharge himself from future liability by putting an end to that authority

this is merely merely those with whom the Servant has been trading not is bound any further in his the master's account, but he cannot discharge himself from future liability by a private order to the Servant for this is unknown to others, even a dissolution of relation of Master and Servant, will not discharge him from Similar purchases by him who was his servant until such dissolution has become public, or at least known to those with whom the master had given his servant credit.

And in every case when he has given his servant such authority, the prohibition must be as public as the credit had been extensive, If he had given him credit with A. only notice to him is sufficient, if to a certain number as A.B.C.D. & F, notice to all them is sufficient, but if the Servants authority had been general and to trade wherever he became, the notice must be to the Public. 3 T.R. 760-1. 10 Mod 109. Ch. Bills 26-7. 12 Mod 346. Peake N.P. 42, 154.

If a Servant is selling property which he is authorised to sell belonging the property, the master is bound by the warranty.

But an express prohibition to warrant when there is no previous authority will be sufficient to exonerate the Master (authorities in both cases 4 T.R. 77. 2 Ld Raym 575. 583. Salk. 289. 10 Mod 109. Esp. N.P. III. Esp. Dig 630

But where the servant acting within the scope of a general authority had only to sell but his Master tho the latter expressly prohibited him under pain to warrant to the purchaser, for a purchaser has a right to presume that the general authority continues until he has notice to the contrary. But the case is different when the

Servants authority is special. 7 T.R. 460-1. 1 Selwd 109.
This distinction between a general and special authority
appears to be based on general maxims and is
not supported by the particular case of Doe v. Bennett 5 B. & Ald 232

There is one case which I cannot reconcile
with the principles, viz. of a man employing a special agent
to sell certain goods, which the principal has not
power from the principal with the express authority
and to, the agent sells them to be genuine on his own
intermediate comments in effect. In one of the Reports on
the matter the Col. held that it would be fair enough
the same in the 464, Appleton 140. & 13 Ga 500, but it
appears to me that the matter is clearly doubtful. The
servant is held to be a special agent; but the warranty
found by his warranty merely is extraneous - but it may
be said there is no warranty, but the concealment, the report
and then is a fraudulent warranty, and in such case
the vendee may allege in his declaration a warranty
by the vendor and proof of such concealment will sup-
port the declaration of warranty, for that in principle is similar
The two cases in 3 & 4 Term are in point Z. Bell K.B. Exp Dec. 29
632. These authorities support that a concealment of defect
is a warranty

A third case is intermediate between the two. The
P. a merchant orders his servant to sell an unsound horse at
a fair, but does not order him to tell him to say an imperfection. The servant is not sound it is the warranty but if he
had directed him to do so by any positive indication
he would be liable. It is not probable for me to see that dis-
tinction for in fact, it is no more than this. There is no evidence
to cheat P. he would be liable but if he directed otherwise he would

it would not be liable. Holt 95 Pitch 146.

So the clerk of a tradesman warehouse, unauthorised to receive the goods or convey them away, the master is liable in the business of carrying case Holt 282, 289. Litt 653, 3 Term 35, 4 Mis 177.

But a servant in the course of his master's business may render himself liable as if the clerk in the shop and delivered the goods improperly. In the Trader, but if his master, not his own name. Holt 95. 3 Bar 503.

Not undoubtedly if a servant, under a contract for his master's benefit, is then so entirely to make him liable for his own case the master is not.

Nor did Lord Kenyon intend to say other persons acting under an authority from their master, independent of a special, if at the discretion. Mans contributed, for the doing of matters the latter alone laid down 13 East 430.

A master is not liable, in general, for an act done by his servant, unless it be, by any means, by contract. The mere act of the relation of master and servant is not sufficient for it to render the master liable for such expense. Litt 653, 2 Bla 789, 2 Bla 799 Foreman v. Bart 4 Bar 2, Bla 8. It is here not in a general but mere are incorrect.

But this case does not hold in law of a place for an Elderly man to be said or his servant or the master. However in one clause, a case called Lyquent the message is that the master doubtless will expense and it is to be here he is connected liable, but this was from express of the contract to the effect, for it is a distinct argument in an indenture in Common, from that the master shall provide for the expenses of the hospital

health, but if there is no such covenant I am not aware that he would be liable under this clause rather than in any other.

Of the servants liability for his acts or torts to a stranger or to his master

I have observed that those acts and omissions by a servant with the consent of the master either express or implied are accounted the acts of the master for all such acts the servant is alone liable.

If the servant does any act not authorized by any authority from his master either general or therein specially intended, by which a wrong is sustained the master is not liable but the servant is. For such acts Parents are not liable for their children committing by their children 1 Bl. 431. Shep 228. 3 Bac 503 and the general reason is that in such cases he does not act as servant; and it applies to not cases where the servant is not acting in the ministerial of his master business with which he is entrusted for then the act is not by either the express or implied command of the master hence the master is not liable for his servants unique acts &c.; Dig 503, Comp 408 n 8. Salk 18 b. 3 Ld Ray 1313 Ld M.

In same cases both master and servant are liable as if the master has the negligent misdoings of his servants injuries through negligence or want of skill injure a stranger or third person at time and the master is liable & given day then the servant is also liable

Hence if a servant drives his master's carriage so that a stranger and injures it, both are liable provided it was the negligence or want of skill &c. and the stranger has the election which to pursue and may select the servant because he was the author of his injury but if he chose to inquire whether

he is a Servant and? So the Servant his master Feb 1683. Hob 325. To Dig 576. 575. Ray 220. 6 Ch. 411.

2 This rule then is an exception when the remedy is a breach of contract between the master and the party injured for in such case I conceive the master alone ought not for the loss be upon the contract: which may be either express or implied for the act of the Servant is that of the master in the performance of the contract. as if the Servant or a stranger spoile a gissment, this a breach of contract and the Servant is not liable for his act is that of the master and the reason is that the contract of bailment is violated and in contemplation of Law it is violated by the master for no one but the master can break his own contracts, neither has the bailee any thing to do with the Servant. Cro. 406. 1 Salk. 401. Gilb. Dig 586. Salk. 0016.

3 This rule then is an exception in the case of a Ship master. for if the Freighter sustain a damage in consequence of the Ship. masters neglect both master and owner are liable. This holds tho the contract was made with the owner alone. This is admitted to be an exception. The reason assigned by Lord Holt is that a Ship-master is an officer. This is not a satisfactory reason to me. Salk. 440. 1 Ven 190. 2 Sk. Ray 220. Salk. 440. The reason may be, the wrong of the side for it gives better that the owner lost in the carrying and the master his master, and is bound be a great inconvenience to load the Freighter too much liability to the owner when they but the master either one party or other owner is, that the master signed Bill of Lading and then is a stale, a contract that bind the owner may be the case is well established,

But if a servant commits a wrongful act he is liable in all cases tho the relationship was founded on contract between the Master and party injured. Thus if the servant of a friend wilfully injures a horse, he is liable for the tort as well as the master in the contract for the act of the servant is an abandonment of his authority.

So if the master should in throwing a horse wilfully injure him he would be liable, liable disjunctively and in the implied contract as the injured party should elect, and if he could subject the master in felonies he could the servant.

If a public agent in the office of the Crown or comes too much either through mistake or ignorance of the law he is not liable for it. This case the govt is liable, and neither can be sued for the govt, and the moment he receives it it is the property of the Government, and the only means of recovery is by application to government as I have commenced.

But if such public officer contributory money for his own use he will be liable for it and not it belongs to the Govt. If the money is done thro ignorance he is not liable, but it is wrongfully he is. Cowper 182.

If an atty throwing that a bill has been paid and he even intercepted a money yet if he brings an action for the recovery into court and he is not liable, for he acts as a servant. This is no reason for the rule. But it may perhaps be he has no right to judge over his client, for the latter may contend that the action was fraudulent, &c. 1 Bos & Pul 96, 1 Esp 209 2 Bos 545.

But when an action was brought against the Carter had suffered a nonsuit, entered up judgment and got an execution of the debt he was held liable to his master in an action for it was a fraud, it was in violation of his duty as an officer of his Court and of duty to his client. Sutton 125 Eng Deg 618.

Servants liability to his Master, or his lords.

It is a general rule that for all wilful acts and acts by him done negligently and by which the master or lords are injured he is liable to his master. This holds universally except in the case of an infant servant who they are and are not liable ind. "Infancy" i.e. if the Servant should keep his master waiting to do the work he is liable 5 Bac 564 So if a clerk or other Servant of a merchant should lend goods when the law requires goods not to be lent except duty should by which they were forbidden the servant is liable and so of a thousand other like cases. 5 Bac 265, Wilde 19.

But no action can be sustained against a Servant for a breach of duty if no damage ensues or if the Servant should return to obey the order or direction to be so by his master. The master cannot remedy in his hands to immediately charge Servant Cro Eliz. 3 Bac 564. This allows a rule which provides the other law that when in one side there is a wrong but no injury in the other no action lies. But if in consequence of disobedience the master sustains a damage the Servant must be liable Leigh. 1200 188.2 Cro Car 85.

And the rule is the same when he neglects that it is his duty to do. A letter expressly to order his

provided that damages to the master as the consequence.
N.B. If a claim suit is discontinued thro' the negligence of his atty the latter is liable for the damage 2 Wils. 325. 4 Burr 2060. Eds Dig 67.

Masters authority over the Servant

In master has a right to maintain chastise his servant for any fault or neglect of duty or duty. 1 Bulst 425. Hunt vs. 2 Keb. 623. Co Ent. 179, 1. Saunk. 111. 166.

This chastisement must be reasonable for if it is outrageous he is not justified. But there is by the ancient discretion allowed to the master for it is impossible that every master should be able to weigh out the exact extent and severity of punishment, which his servant merits, in such, or such 167. 8 & 128.

This rule is too absolute, for all masters have not that right, nor is it restricted thro' a master has a right to chastise his agents, or factors, drivers, attorneys, ship-masters &c.

I suppose that the rule contemplates an other class of servants than those which belong to the master family and are under his domestic government. For there is no doubt but that he may chastise his slaves, children or minor wards. He may correct a slave or an apprentice at any age but if he treats any other servant after full age he is not justified as if he should beat a day laborer. He has a right to correct a day laborer if he is under age for then he is supposed to want direction. But if laborer or his wife or children are under or a member of his master family then he would be entitled to correct

[illegible] but the rule above [illegible] are not a [illegible] member of the master's family. 1 Bl. Rep. 428, Lofft 168.
The rule of the Law of the Constitution is by the Master's life. 1 Bl. Rep. 428 in Notes (Chase's case).

And when a master sends a servant abroad to [illegible] on his right, it is a good cause of his absence. 1 Bl. Rep.

But a Master cannot assault a servant for his contempt in the servant's priority either of their rights by virtue of his right of chastisement as Master. For he must chastise severely if at all, and if he is used for the battery, if he pleads his right of chastisement, it is ill pleaded, the wording thereof he must plead not guilty or else plead the whole matter in bar he justifies the words in self-defence 2 Mod. 107, & 1 Ro. 218, 330.

If he pleads a justification in virtue of his right for the whole i.e. the assault, battery and wounding his plea is ill for the whole for if the plea is ill as to part of the damages it is ill as to the whole, as to the form of pleading see 1 Lev 177, 3 Bac Ab Master & Servant B?

But a Master cannot delegate his right to another for it is strictly personal because every contract of this kind is fiduciary 1 Ro. 76 a. 2 Lev. 166, 3 Ed. Kenyon 62, 310. Stra 953. Ro. Ab. 66.

If however the master gives his servant to understand the instructor has a right to correct him in a reasonable manner for a reasonable cause, yet he and this power of instructing not from delegation from the Master but conferred upon him by Law, instead.

If a Master in correcting his servant kills him, it will be a complete homicide, manslaughter or murder, according to the circumstances of the case.

For a full explanation of this rule, see "Lex Commissoria," 1 Cook 111 Bac. abr. Mord Ser. N. Lat. 202, Kel 65, 5 Mod 287.

Master's remedies or others for injuries done to servants through, or in relation to his Servant.

I have before stated that an action lies in any one who entices away another's servant during the time for which he is retained as servant. This action must always be laid with a "per quod servitium amisit" for the loss of service is the "gist" of the action. But for the act of entising "per se" he cannot maintain an action. Cowp 566, 11 Mod 182, 2 Salk 380, 2 King 1116, 3 Bac 11 Ser 3 Ed 1 ... 409.

And if a Servant runs away from his master without just cause and without being enticed and is retained by another the loss of the former is lost. The master may have an action against him. But a "per quod" for the "service" is the gist of the liability. King 116, 11 2 Lewis 63, Bac. M & Ser E. C.

But an indictment will lie at Com. Law 116 11 for enticing away a servant. For the injury is civil. Bac. A. Servant, C. Salk 380, 2 580, Feb 111, 2 Ld Raym 1116.

If a Stranger is beaten by a Stranger for alone is entitled to an action for his personal injury. But if a Child or servant assaults, the master has also his action with a "per quod". In this case a recovery by one is no bar to the action of the other for their rights are separate, and their injuries distinct. "Co 116, Bac Abrd. d Ser. C. 16 Co. 151, 2 Kebl. 198.

If the master neglects to lay with a "per quod" his declaration is radically bad and is fatal on demurrer, matter can it be cured by verdict. Bac. Master & Ser. C. Cro Jac. 683, 1 Wlk. 429, 4 Co. 116.

A master should is a Servant, within the rules.

and an adult child may be also, - for every child is not emancipated when of full age. The this enables them to emancipate themselves, but if a child continues after full age in his father's family as a volunteer he is a servant de facto, and the master rights are the same in this respect, when his servant is injured as when de jure.

But if a servant is injured by a stranger that he sues the master has no remedy for his loss of service at the Com Law. and the reason is, that since at Law both the life and property of the offender is forfeited to the public there is nothing left whereby the master can be satisfied Yelv. 89, 90. Mag. 339, 2 Roll 568, Bac Abr 1, S. 6 in the civil injury is merged in that of the public Yelv. 89, 90.

If a Surgeon undertakes the cure the wound of a servant intentionally injures him so that there is a loss of service the master has his action per quod Bac Abr. Ab. 1 Roll 98. 2 Bulst 332.

If there are two cases where the master shall retain if the injury to the servant and consequent loss of service was occasioned by the negligence or want of skill of the Surgeon. But the servant is not even worth have an action for the mal-practice. Ewbank 601, Lil Reg 248, Stark 348. 2 Vol 357.

Third I am not aware that there is any wrong in the law that would give the master an action in such a case

If a servant is enticed or taken away or conveyed by the master against him or else to a stranger who by him is the action a release for the master

his election to use either but he cannot have a remedy in Both; for there is but one injury and of course he is entitled to but one satisfaction Bac 1342. 1 Blk. R. 387 Esp. Dig 309.

What acts a Master or Servant may justify in each others defence

But by the way a master may aid and assist his servant in defence without incurring the lo, as guilt of maintainance but if a stranger gives such assistance he was guilty, but this branch of the Com Law has gone into disuse. there are not, tho' any no instances for this offence, but it was much regarded anciently, as the Com Law denounced Liberation and this was one reason why there in action were not assignable at Com Law. 1 Blk 429. 2 Rol. R. 115

A Servant may clearly justify an assault in favour of his master &c, may take his part in the quarrel and is justified in having the same value and welcome what the master himself was to assume himself. But a stranger could not aid the master interpose to prevent a breach of the peace, but could not take sides. The reason of this is, such rule that the servant is obliged to assist his master, But I have no idea that this is the reason, for no law would compell him to take a part in his master's quarrels. But I suppose it results from the analogy which it bears to domestic relations. Bac Abr. Ass. 2 Salk 417. 2 Rol. R. 546.

But a servant as such cannot justify a battery in the defence of any other person except his master for he cannot in the absence of his master stand a children in court.

But in his own capacity as a man he may justify a battery in defence of his person or chattels

So can a servant justify a battery in the defence of his master's goods but this supposes that he is not merely entitled but bound for if so he is regarded as the man of all men, his master excepted, and in their defence may justify a battery Bac. Abr. S.P.

Whether the master can justify a battery in the defence of his servant is a doubtful point, but I take the better opinion to be that he can, since who ought in law has his remedy under a per quod or if he sustains a loss of service, also if there is any duty of defence in this relation it would of the two devolve on the master for it is the duty of the principal to protect his dependants Bac. Abr. M. S.P. Lee Reg 62, Salk. 407, 1 Bl. R. 429

If think the there is an additional consideration, he has a master a vested interest in the service of his servant, as he has in his goods and chattels, now he can justify a battery in the defence of the latter and the same principle must justify him in the defence of the former, hence the reply that he has his remedy by action is no answer. For with equal propriety it may be made in the case of a battery that I can not justify in the defence of my goods he can I have a remedy by action. If I sustain an injury by action, tho if I have an action, yet I am not compelled to stand and see my house burnt down or my goods destroyed because in the event of such injury I am entitled to an action, clearly an principle of law in nothing he is justified in a battery in the defence of his servant. Lowe, Pl. 124.5

At Common law would a decision obtained, can him by the assault made on his master, tho if the assault was in himself he would, for the domestic relation is not sufficiently intimate to warrant his acting in relation as not Bac. Abr. Mas & Ser. D. 1 Rolle 687.

But equity would if on cause in that case decree against the act since that Ct. will at under decree for other causes than "direct" but nothing but absolute assault will it is under in law.

Ford & Dunwell's Pleadings

Contracts

شرح الاجرومية

Contracts

Legal writers do not agree in the definition of Contracts & hence this. "A Contract as known to the Common Law is an agreement between two or more parties on sufficient consideration either to do or not to do a particular thing" 2 Blk. 442. 1 Pow. on Con. C. 7.

The term Contract includes not only Executory agreements as bonds, covenants & promises but agreements Executed as a Deed or grant Case H. Assumpsit in a more limited manner and as generally used comprehends only Executory agreements 1 Pow. on Con. C. 7.

A necessary requisite to a contract is parties and their assent is the essence of every contract. 2 Blk. 442. 1 Pow. 9. Hence a person non compos cannot make a binding contract in Law for when there is no understanding there is no volition, consequently no assent. In gen. contracts not of record are made by persons sui juris & under standing are void. Some opinions are that in such cases quasi contracts may be founded to such contracts when made. I think not. The better opinion inclines the other way. The contracts of such persons are void generally as to them, but not as to others. Stat. 4. Co. 23. b. 2 Roll. 728. 1 Pow. 11-2. Brown 2. C. 152.

It seems that to some intents the contracts of such persons are void & not voidable. Hence if a non compos make a lease for life and a contingent remainder to another & surrender by the lessee does not destroy the remainder contingent. 3 Mod. 296. 301. Cro. Eliz. 576. 2 Lev. 281. Carth. 211. 50. 455.

But on the question of mental position being a sufficient

Contracts.

the authorities are contradictory, 4 Co. 123. Salk. 675. Esp. Dig. 223 Stra. 1104. Bul. N.P. 172.

I say they are generous but, this is, an unknown time yet a person of non sane memory may receive property by a derivative title. Co Lit 2. 78. 2 Bent. 203. 1 Stra. 12. 13. A conveyance to a lunatic for consideration, is not void for it is presumed beneficial to him, hence it is prima facie evidence of a valid contract. Twelve days the law presumes his absent. I think the law dispenses with his absent, which it requires in other cases.

Such contracts are prima facie evidence of validity. Since if the person to whom the property is derived recovers his senses and assents, the contract becomes absolute, as if he recovers his senses & dies before the assent, the Contract is binding on his representatives unless he disaffirms it, which relates only to contracts of purchase by such persons. Co Lit 2. 2 Bent. 203.

On the other hand, where a contract is made by such a person for alienating his property the contract is void there is no assent presumed, nor can it be dispensed with. (as aforesaid)

But even in regard to this class of contracts, it seems settled that the insane person himself, cannot in every case avoid it on the ground of incapacity, for "no man can stultify himself" Co. E. 398. 4 Co. 123. 1 Bro. 44. 1 Ath. 41. 3 Lev 405. Contra 2 Bent 195. Stra 1104. Bul N.P. 172.

The weight of authority is against permitting fraud to thus circumvent, and this reason is to prevent fraud, by presumed insanity. Coke's reason thus "that if he was really destitute of reason then he could not know what he was" it is no matter as to his knowledge

Contracts.

if the fact can be proved to the jury. Connecticut Courts have exploded this rule 3 Day 96.

After the insanity death if real property is in question and the Exec.r of personal. sing at Com. Law. avoid the Contract — 4 Co 124. 5 Ro. R. 398. Ch. 262.

But the original party cannot himself set aside the Contract on the score of incapacity, thus as 2 Mod. 68. which his contracts may be set aside during his life. 1st. a. the inquest of Office on a writ. de idiota inquirendo, a "de lunatico inquirendo."

The King as parens patriae may by a sci-fa. set aside the contract, this Office found does no more than a secondary inquisition of lunacy, never found on the writ, this has relation to the commencement of the patent deputility, and Contracts before office found are avoided as well as those after it. 4 Co 125. 7 B. 8 Co. 170. Pow. 24. 7.

I conceive it incorrect to say that the office found per se avoides the Contract, it is only evidence.

2d. Mode is by bill brought in Equity, by the Attly General or by the Party's committee. but in either case the Party himself is no party to the Bill. for he cannot sue in his incapacity. 2 ver 414. 3d P. Wms 105. 11. 3 Atk 170. 1 Ch. cases. 279. 1 Pow. 26.

A suit in Chancery may be brought in behalf of such person to compel a performance of a contract made with him while sane. he is a party tho insane and must appear by a committee as an infant does by his guardian. a next friend for the time is not bound to satisfy him or to permit to take advantage of it 1 Pow. 28. 9

Contracts.

But if a lunatic makes a contract in a lucid interval he and his representatives are bound by it. for all that is necessary to the validity of the contract is that he be capable at the time. 4. Co. 125. a. 2 Ve. 412. 4. 3 Bac 89. Idiots Lunatics and Infants are bound by other persons by contracts of record, as by fines & common recovery such judicial conveyances cannot be avoided by himself & his heirs. for no averment can be admitted against the Rec. 4 Co. 124 Co Lit 247. 11 Co. 42.

All non compos mentis are not idiots;

An idiot is one who has from nativity no glimmering of understanding. 1 Blk. 303. 304. Fitz N. 233. 3 Bac. 79.

A Lunatic is one who has had understanding & lost it by some supervenient cause. All persons non compos mentis are either Lunatics or Idiots (ibi Inst.) 4 Co. 125, Co Lit - 24

A temporary insanity produced by voluntary intoxication is not of itself a ground on which a contract may be invalidated in Law, or in Equity, This is founded on policy and morality. the insanity is deemed the fault of the party. 1 Ves 19. 2 P. Wms 131. 1 Pow. 29. 2 Ves. 462 1 Fonb. 62. Cutter 13 Ves 172.

If a party to a contract has drawn the other into a state of intoxication by any artifice to obtain an advantage over him, Equity will set it aside tho the law could not this is not on the ground of intoxication per se but that it was an instrument of fraud 3 P. Wms. 1 Pow. 18.

If a party's weak understanding is not per se a ground to avoid his contract yet where — does not come within idiocy & lunacy, for the Court cannot determine as to the sense of the parties, whether it be

above mediocrity, a bettor it. 3 P. Wms 129. Fonb. 56. 63. 5.
But this weakness may, as evidence of fraud or imposition be a ground for setting aside a contract in Equity. In such cases if there are circumstances amounting to suspicion of fraud. Equity will avoid the Contract. 3 P. Wms 129. 2 Ro 228. 1 do 31.

On the same principle which renders a contract void for want of assent. the Contracts of Infants of any age are not binding except for necessaries. Mt Parent & Child. 1 Pow 32, 59.

In Eng. of Law an infant has no mind

The Contracts of FEMME COVERTS, are regularly void. for want of a sound capacity. herself is subject & subordinate to that of her Husband, Mt. This & Wife. also for want of property and the controll of it & the husbands marital rights

Who by their agent may bind others as well as themselves

A Tenant in tail cannot by his own act alien his estate to the disinherison of the issue in tail but if he contracts to do it by Executory Agreements, he is in Equity bound to do it, when he is compelled to levy a fine for performance of his agreement. for as a Tenant in tail may alienate & bar it in law he has it in his power & thus Tenants in tail are not favored in Equity 1 Ch. 171. 1 Pow. 112. This is a case where he may bind others

The cestui que Trust may by an agreement to which the parties are not trustees, bind the trustees as well as himself. That is, Chancery will compel them to convey in performance of it (. iis. Ment.)

The reason is the beneficial Interest is in the cestui que trust.

Contracts

and the Trustees are mere depositaries of the title for his use.

On the other hand, a Cestui que Trust may have his estate bound by the agreement of the Trustee to convey to a person having no notice of the trust, for where the equity is equal the legal title shall prevail 1 V. R. 735 & 705. 1 Ver 134 & 334. 44 j. Pow. on M. 295. 113.

An ancestor seised in fee may bind his heirs by an agt to alien his estate and if he dies before conveyance the heirs may in Equity be compelled to convey. This supposes an executory agreement. At the time of making the contract the ancestor had the absolute title and the purchaser obtains a higher title than the heir. 2 Ver. 213. 1 Pow. 715.

The covenants of a woman made before marriage will bind the husband whom she afterwards marries if he takes her property as it is supposed, on her marriage suspends her liability in such case he is liable only during coverture 2 Ver 448. 10 Mod 160. 1. 243. 1 Pow. 123

If a Tenant in tail agrees to convey the inheritance and dies before he has levied the fine the issue cannot even in Equity be compelled to levy it, for they claim by descent not by performance perfected. 2 Vent 350. 1 Pow 125. Hob. 203 Prec. in Ch. 278. 2 Vern 834.

If however the issue in tail receive the consideration of the agreement they may be compelled to convey after his decease for they take the benefit and it is clearly a recoverable. 1 Pow 126. Joph. 194. 11 Co. 50.

The rule is the same. If the agreement was to dispose of the paramount title or produce of the land as timber trees, it is void.

It is a very comprehensive rule that the Ex.rs & Admin.rs of a deceased person are as to his contracts implied in his stead that is they are bound by them without being named. 2 P. Williams 197. 1 Bro. 128.

Fiduciary contracts form a gen. class of exceptions under this rule. There the Excr.s are not bound.

If a Joint tenant agrees to alien his part and dies before it is executed, it is said the surviving Tenant is not compelled to perform it. For his claim to all is prior to that of the person claiming under the agreed for part of it for his right is inchoate. 2 Ver. 45. 63. 1 Bro. 129.

It is said of late that if the agreed of a deceased tenant amounted in Equity to the severance of the Joint Estate, the survivor may be compelled to perform it. This seems to reconcile the rule for if it is a precedent agreement the vendee is in Equity considered as the owner and it amounts to a severance.

On Common Law principles the Contract cannot be enforced. New Land on Cont. 35, Amb. 277.

The assent may be express or implied or tacit

By words, writing, sign or gestures.

This assent may be precedent concomitant & subsequent to the principal act. 1st If a master his servant sends a his agent to buy a certain article, then the assent is precedent. 2d If one makes a purchase on credit and promises to pay the price of it then the assent is concomitant. 3. If the servants buys an article and without the master's authority

and afterwards the Master assents to the contract and ratifies it. 1 Pow. 131.

A tacit & implied Consent may be raised & inferred from mere silence & inaction thus if a prior Mortgagee being present at a treaty pending to make a subsequent Mortgage of the same property knowing it is voluntarily silent, he loses his priority on the ground of tacit consent, that his claim shall be post poned 2 Ven 151. 1 id. 370. Pow M. 185. 1 Ves 6. 1 Brooks. 357.

Same rules hold in cases of prior & subsequent Leases. & in case of an absolute purchaser. Pow. M. 183. 5. 2 Ven 150. 239. 1 C. C. 355

A Court of Equity in such cases as these enforce such implied consent even in the case of Infants and against them. Barnewell 102. 3. 1 Pow. C. 134.

Courts of Equity will exercise a discretionary power over the estates of Infants, when the Law does not and will not prevent the Infants practising fraud in most cases.

To create such implied consent in such cases. It is necessary not only that the party should know that his own claims intrench with the subsequent contract but that his silence be wholly voluntary. Pow. 134. 5.

In general the law will create a tacit agreement when it is necessary to give effect to some principle express contract. As if one sells trees in his land the law implies a privilege given the vendee of flos. inquis & equis to take them away v. Co Litt 5 b. 2 Blk. 35.

According to Powell there is one species of tacit agreement in every contract. if either fail to pay when his part. that he will pay the other what damages accrue on failure of

of performance 1 Pow 137. He cites 2 Bur. 1011. 3 Bl. R. 166.
I think it not a true theory for it is not alleged in pleading.
When one usually employs another to contract for him in trust, he tacitly assents to any particular contract of the same kind which the agent may afterward make, for he has given him a general credit with the Public & it only can be withdrawn by a notice coextensive with the credit 1 Pow. 138.
In every case of feoffment, gift, grant, or surrender &c. there is a tacit assent on the part of the Vendee or Grantee, until the contrary appears, for one is presumed to assent to that which is beneficial to him. Suppose a debtor has occasion to secure a meritorious creditor in N. York, without the knowledge of the creditor, mortgages the estate to him in his absence. This conveyance is good if the creditors claim is a debt unless he dissents, 1 Pow. 138. 9. 3 Co 267. Stra 165. 2 Lev. 233. 4 Mod 395.
This principle holds as to legacies and devises.
If a husband turns away his wife under circumstances which do not amount to a forfeiture of her claim for necessaries. The act of turning away is a tacit assent on his part to her contracts for necessaries

On a Sale of personal Chattels there is always an implied warranty of the title by the vendor unless the vendee assumes the risk. It is analogous, for the title to a chattel cannot be traced further than to the last possessor. 3 Bl. R. 57. 1 Comb. 109. 3 T. R. 692.

How an assent given to contracts may be invalidated

Ignorance and error will in some cases.

Contracts

If a mistake as to one party, is occasioned as to his rights by the fraud of another, the Contract is not binding in equity whatever may be its form, if however it were under seal it is good at Law. For at Law. No fraud but such as goes to the execution of the instrument can invalidate a sealed Contract.

When at law at Law was fraudently made to believe that he was disinherited & hence induced to relinquish his claim for a trifle. Equity will set it aside 1 P. Wms 239, 1 Ver 19, 20.

If on a doubtful point of right both parties being equally on which side it lies, enter into a contract by which the party really entitled is the loser, the Contract is good, for they agree on the ground of its being doubtful, and knowing that one or the other must lose 1 P. Wms 726, 2 Atk. 587, 1 Ves 142

-3.

It is laid down as a rule that if the party really entitled is ignorant of the extent of his rights and the means of ascertaining hereof he is not bound by the Contract in Equity. The meaning is he must be ignorant of the value or quantity of the Property, was a bequest to a daughter of $10,000 when her expectancy in Custom was $40000. the not knowing the value accepted of the $10000 was released the residue Here she was ignorant of the true value of her expectancy which was a matter of fact. 3 P. Wms 316. 2 Ves. 300. 1 Ves. 144. 5.

An analogous case is in the Books called the School Master Case, Sandersons vs Sanderson, where both parties unanimously guided by the opinion of a third person, made a contract by which one party abandoned his whole interest in the elder and younger brother claimed as co-heir. each

declaring himself the heir at Law. They applied to a village School master who having read Coke, which land descended and to whom, decided that it descended by gravity as low as it could go and consequently to the Youngest as heir at law. The Elder brother relying on this pedagogues decision, settled the titled reserved his claim to his Younger brother. But afterwards Equity set it aside 2 Pow. 196. Here the mistake was a point in Law, & no one can aver his ignorance of the Law. If there is any principle for this decision it is this - that the parties were deceived & that the innocent deceit was a real fraud.

Generally speaking a mistake in point of Law is no ground for avoiding a contract, at Common Law & Equity 2 East 469.

By the Common Law wagering contracts are binding gen, but the rule has been limited by Stat 11 C. 876. 1 Lev. 33. 5 Bur. 2802. Lord Holt says this rule has caused a great deal of grumbling. Hale & Buller thinks such precedents ought to be disregarded & that such contracts should be absolutely void. In Connect they are void by Stat.

It is sufficient to the validity of a wager that the event on which it depends is equally uncertain to both, it is not essential to its validity that the event should be contingent. Comp. 3. 2 Rep 610. 3 do 693. Pow. 146. Yet the parties may make the bargain on the ground that they are ignorant of the fact.

There are cases in which the absence of an existing deed or chattel may be invalidated in Equity (as by erroneous) as by erroneous representation of the quality of the subject

the no particular fraud is in the case. in others such representations though, not true will not invalidate the Contract.

The Rule is if the mistake thus occasioned affects that quality or circumstance of the subject which is the sine qua non, of the purchase it is not binding; But if the mistake occasioned by such erroneous representation relates to a thing which is not the principal motive to the Contract it will be enforced. The purchaser relief lies only in a compensation for the difference in value. A agrees to purchase B's Estate. B represents the rent at $1000 but it not more than $900. The Contract will be enforced for this rent is not the sine qua non, to do justice the difference must be made up. 1 Ves 400; 2 Ves 185. 1 do 32, 1 Pow. 147. 9 n. 2 d. 196. 201.

On the other hand if on an agreet for purchase the purchaser makes it a condition that the subject shall possess certain qualities & that the absence of those qualities shall exonerate him a invalidate the contract, as on an agreet to purchase land & it is a condition that it contains so much meadow. which it does not, here the Contract falls by its own terms 1 Pow. 150

In some cases the agent a their want of agent may be inferred from circumstances 1 Pow. 150.,

If a person drees a female slave in mens clothes and sells her for a male slave the contract is void

Powell says that if an ass and horse be sold for a price in which he could not have been bought had he been thrown to be unsound, a bare agent may be inferred from the disparity of the price

1 Pow. 150. I see not how such a rule crept into the law thro such a Lawyer as Mr. Powell, Now, when a person purchases an unknown article without warranty for full price each party believing it sound he has no remedy in law or in Equity, unless there be a fraud 3 T Rep. 757. 1 id 135. Peake R. 115. 2 D. 2 East 314. 1 Pow. 142.

Comm. Reps have held that there was an implied warranty in such cases. 2 Ro. Ab 407. There is an exception to the maxim "Caveat Emptor" in the sale of provisions 3 B&R 1656 1825 This doctrine of implied warranty does not now exist. F.C. 4 Cr. Rep Dean Nuw

Contracts are Executory & Executed. The first is to perform a Contract in future. It is a title conferred a Cont. completed 2 B&C 443.

8th What is the subject of an executed Contract

The rule is that no person can by an executed contract transfer property in which he has not the actual or potential interest, at the time, for one cannot transfer in presenti what he has not. If A sells B all the wool he shall purchase in 10 Years the contract is void for it purports to act on a present existing interest, Hob. 132. Co Lit. 309. 4b. 1 Pow 152. 3. 3 Levinz 146. Plow 432.

Nor can one by a contract executed bind property to which he has but an inchoate title to be perfected in future for he has only the commencement of a title. On this principle one cannot transfer a contingent remainder An estate is conveyed to A for life with remainder to B. with day of his marriage. If B conveys it the day before his marriage the conveyance is void. 3 T Rep. 248 Dyer 221. Bro 135. Leam 441.

Such contingent interests are devisable, descendible,

and transferable in Equity. For Equity considers an executed contract of this kind as evidence of an Executory contract. 1 Sand 202. 3 Y. & J. 88. 1 Ves. 134 & 407
If a gives a Bill of sale to B. of any wefel he may own for ten years to come. it is void by Stat 29. B. Hob. 132.

On the other hand, A thing, of which one is potentially the owner, may be disposed of by a contract executed for he has an Interest in posse as distinguished from one in esse.
A thing in posse is a thing accessory to another thing actually vested in him at the time. One may grant the profits of Land which he now has for time to come. Hob 132 1 Powl. 156-7.
But a Esse not actually, a potentially vested may be the subjects of Executory Contracts. which are nothing more than stipulations preparatory to the act by which the Interest is hereafter to be conveyed.
Thus if A. Contracts that he will purchase land which he does not now and convey the same to B. it is binding) a if A. gives authority to make leases of Lands which he may afterwards purchase a be seized it is good. Where there is no future act to complete the Contract it is not Executory 2 Ellk 443. 1 Pow. 158, 60. 234.

Notwithstanding these rules a Contract executed may bind a future Interest by way of estoppel. not on the principle that such contracts can ever convey the property but on the rule of evidence that matter of estoppel prevents his averring that he had not the interest at the time of making a conveyance of property, belonging to B, to C,

identifying it by an caption as his own, with a covenant that he is well seised, and afterwards purchases it, C. can recover it of him. he is estopped by his deed from averring that he have no interest, 2 Bl. Rep. 295. Salk 296. Pow. M. 97. 2 Lutw 1048. 1550. 3 T.R. 870. 1 Lev 446. Co Lit 265.

The requisites of a Contract are,

1st. That it be capable of performance, 2d. Lawful, 3d. certain in its terms,

1st. No rights can be acquired or obligation created by an agreet to perform what is originally impossible. Perk. 735 Co Lit 206. 1 Roll 420.)

It does and must necessarily appear upon the face of the agreet that it never was intended to be performed by either party.

2d But the law distinguishes between act or things in se & strictly impossible, and those which are impracticable to the party. If a pauper should promise to pay a Million of Dollars it is binding, because it is not physically impossible tho out of his power, or at least the agreet is not void under this rule.

If a Ct. Contracts to sell an estate of B. who will not sell it to ct. to enable him to perform his contract he is still liable for damages, for the contract is not physically impossible 2 Ld Ray 1165. 1165. 1 Pow 161-2.

There is a class of cases upon which the judges have been at a loss to determine. A entered into a Covenant to give B 1 Barley corn on Monday ensuing and 2 on the following Monday and so on in Geometrical proportion. A agreed to pay B. a blacken. ith, 1 Barley corn for the first and 2 for the second and so on for the horse. The Ct. held

that A was liable and it was left to the Jury who allowed the Plff the value of the horse. 2 L Ray 1164. 6 Mod 305. 1 Vent 269. 1 Wils 295. 1 Keb. 569. 1 Vent 269. The Court have deemed the express contract void and raised an implied Contract. The rule of damages for not delivering a specific thing is the value of the thing at the time it should have been delivered 1 Saund. 424. Strea 406. 2 East 211. 1 Pow. 408.

I conceive the course of the Court was correct to consider the express contract void otherwise they must have decreed a specific performance. I think such a contract ought to be considered as impossible or a Contract obtained by fraud.

The distinction between a mere and remote possibility is not regarded in Contracts. A contract is not void on the ground of its being impossible unless it is absolutely so. If a Vendor in fee with a mere possibility covenants that it he dies without issue. B shall have the estate for life, it is not impossible & consequently not void

A in London covenanted absolutely to be in Boston by a certain day, with a ship to receive a cargo from B. The time allowed was sufficient, yet A was prevented by bad weather B resorted on the Contract 3 Burr 1639. 1 Saund 366. Doug 259. If A had covenanted to be in Boston in 24 hours or 4 days it would have been void. The covenants here is considered as the insurer against the risk of non performance, & if B. had expected bad weather to have prevented him he should have inserted a condition in the Contract

When one is prevented by inevitable accident or from performing a penal condition, the penalty is saved this depends upon the nature of the conditions such as an express covenant from

by Land if B. had covenanted to convey (the conveyance) land B. provided he arrived at a port at the time. here it could not work for there is a precedent condition. But if it be a sole equitable condition it would work

Every Contract must be lawful, The thing stipulated to be done must be lawful, for no one is bound to perform what the law prohibits, 1 Pow. 164-5. 1 P Wms 189. 1 Fonb 216.

A Contract is against law when it is to do any thing malum in se or Malum prohibitum, ,is Ancl;-
Of the first kind are any Contracts which have for their object something forbidden by Natural Law, as murder robbery &c. for no one can derive a right from an immoral cause, 1 Hunk 103. 1 Fonb 213 Comp 39.
Contracts are contrary to Law, when they have for their object what is not against, natural Law, but repugnant to the Law of the land.
It may be repugnant to the law of the Land in three cases of cases.
1st. When the object of it is against the public Welfare,
2d. When it is against the maxims of the law.
3d. When repugnant to some Statute Law. 1 Pow. 166. Comp. 39. 8 T.R. 89. 2 Wil. 341.
1st. Any contract the gen object of which is the restraint gen restriction of one exercising a particular trade is void as opposed to the policy of the law. Hob. 211. Cro E. 872. Ray 292. and
All contracts whatever they may relate against national policy are void as one tending to defraud the public revenue which is not solved by Stat. 1 Hen Blk 322, 327, 7 T.R. 543. 8 id 89.

And for these reasons a contract that a party will not exercise a trade for a limited time is void. Co. Lit. 59b. 1 P. Wms. 181. 7 T.R. 548. for it is against the public welfare to prohibit one from following his trade, 11 Co. 53. B.

But an agreement that one will not exercise a particular trade at a particular place is binding for there is not a gen. restraint, and such contracts may be beneficial Co. Lit. 59b. Farm. 172, 1 Pow. 167-8.

But even this contract is regarded by the law jealously and is subjected to certain restrictions and it requires it not to be founded on consideration, but in what the Court & Jury would hold an adequate consideration and the onus probandi is on the party enforcing the contract. for the presumption of Law is here that there is not a sufficient consideration. This is contrary to the gen. rules of Law, for in Str. 739 & 1 P. Wms. 181 & in other cases there is a consideration presumed by law to be sufficient, until the contrary be proved.

It is immaterial whether the trade or occupation which one agrees not to follow, is his own trade or not. 1 P. Wms. 182 & 172, 1 Pow. 169.

So also on the same principle a bond or covenant for unlawful maintenance is illegal for it contributes to litigation 1 Ch. 172 4 Blk. 135.

A contract with an alien enemy is void as being opposed to the public welfare 8 T.R. 648, 1 Ld. 85, 1 Pow. 173.

And hence an insurance on the property of an alien enemy is void for such an insurance promotes the commerce of the enemy with strangers & the subjects interested in the commerce of an alien enemy. 8 T.R. 548, 1 Bos & Pul. 345, Doug. 238, 6 T.R. 86, 1 East 96. 175.

The rule is not universal for there are numerous cases

and laws of war which allow certain contracts, and it is a general rule that contracts which arise out of a state of hostility which tend to mitigate the evils of war, are valid. It is on this principle that contracts for the exchange of prisoners are valid. So are ransom contracts made with an enemy binding. This is one where a captive party agrees to pay a certain sum of money in consideration of his liberation and the master by such a contract may bind his owner, his ship as himself and this ransom contract is also a protection against all future captivity, the same power. This is a principle of the law of nations 3 Bur. 1734. But no action will lie on this contract the restoration of peace. 6 T.R. 23. Marshall Insurance 34. The action must be brought only in a court of admiralty for it arose out of the state of war on the high seas. 1 Bl. R 563. Marsh 432, 600.

It was once determined that this action lay at Com. Law. Doug 619. But it is not collect law. The Parliament of Eng. has forbidden it, subject to give ransom contracts Marsh 432.

Not opposed to good policy are marriage brokage contracts, of every description, which are void.

Hence if the consideration which is the cause of the promise or the promise itself is opposed to any rule or rules a principle, the contract is void. 3 Salk. 97, 1 Com 176, 1 Bulst 38. Thus if a debtor promises the agent & clerk of the office that if he will discharge the debt he will pay him a certain sum of money. the contract was held void. For here the consideration is void. So if a Sheriff for a valuable consideration agrees to permit one to escape the contract is void not for

Contracts

want of consideration as in the last case. but be cause the contract is against law. 10 Coke 76-102. Cro E 194.

A promise by a minister of justice to an executor in his office is void. as also all contracts to indemnify him afterwards. Cro E. 230. 1 Rol 176.

But when the fact which makes the consideration unlawful is unknown to the promisor. a contract of indemnity grounded on it. may be binding. Powell expounds this case incorrectly Hutton 63. 1 Rol. 177-8. This is an exception to the gen. rule. for that is. If one of two Trespassers contracts with the other. it is void or in other words. a contract between two tort feasors is void.

If the Off requests the sheriff on a Ca. fa. to take the goods as the debtor which in truth are not his. and promises to indemnify the Hon'l Sheriff the contract of indemnity binds him Cro Jas. 752. 1 Rol. 178.

All contracts the objects of which are opposite to decency or morality are illegal and void Cowp 39. 729. 735. 2 Y.K. 616. Bib 693.

Hence then a contract for any corrupt purpose is void as if one bets with a voter that such a candidate will gain the election it is void Marsh Rep. 96. Cowp 39. 2 Y.K. 616.

So if I bet with a Judge that he will decide against me in a certain case. 1 Y.K. 56. 1 Rol 184.

So a wager when used as a disguise for usury is void 1 Rol. 184. 2 284. as if A lends money to B. for a certain time and then bets that B will not pay it on a certain day.

So also a wager as to the rules of Playing an illegal game is void.

But at Com Law a "wager" between the Pltff and Defd. in a cause as to the ultimate issue is binding for no real interest is created by the bet Cowp. 37.
Wagers in gen. by the Common Law, where there is no particular are binding. 1 Pow 146. Mark Ins. 96, 2 T.R. 610. 13 T.R. 693.
But if wagers were not lawful how come contracts of insurance to be lawful since it is a wager of chance. It is that the policy is a contract where the party has an interest in the subject of the contract independent of the contract, whereas in the latter the interest is seperate from the contract or that which is created by the contract,

Contracts made to defraud third persons are illegal and utterly void and of all contracts are the most odious to the law. Doug 433. & 450. 1 Pow 185. 2 ib 165. 176. 1 T.R 166. 9 ib. 763. 1 H Bl R. 322. 656. 1 P & P. 95-285.
Such contracts cannot be made valid,
But there is one class of cases viz, marriage settlements, which is an amount that the father settles on his child and is intended to bear relation to the amount settled upon the other party by the friends of that party. Hence if the father of one party should agree with some party to settle a certain sum on him with condition to defraud after the marriage. The contract is void absolutely and to defraud. the Party or Father would be obliged to repay it, or an action lies by the proch ami of the other party Stra 240. Pub Deg 184. 1 Pow 186. Day 670. n. & 696.
Contracts are unlawful when the object is to procrastate the execution of some legal duty are void. as a contract

by a deputy but his high Sheriff not to execute process of a certain class, and the like Hob. 12. 1 Pow. 195-6.
And a contract to indemnify one for any unlawful act is void, as if a writer of a libel contracts to indemnify the printer for printing it. The contract is void for it is to do an unlawful act 2 Esp. R. 643. 1 Pow 196.
But it is laid down that a contract to compound a misdemeanour is not void 2 Esp. R. 643. 7 T.R. 475.
I do not perceive the reason of this distinction 2 Wils 341.

A wager between two persons that either of them or some other person will commit a felony is void 1 Pow. 198-9.

Contracts Prohibited by Stat Law, are void here a loan of money receiving greater interest than allowed by Stat is void 6 T.R. 499. 1 id 736. Allard 96.
Hence a Contract by a Bankrupt to pay a certain Creditor the whole amt of his debt if he would sign the certificate is void, and the rule is the same if the promise was made by the bankrupt's friend. This is a fraud upon all the other creditors Doug 686, or 670 in 1 Pow 189.
The rule is the same when there is no Stat of Bankruptcy

There is a distinction in the Books to what much importance is attached, between Covenants & Bonds for the performance of covenants. In the following one covenant of lease in the same deed is void. the whole deed is void but in the latter the deed quoad that particular covenant are good Plowd 257. 2 Wils 351. 1 Pow 199.

An under sheriff covenants by one and the same deed not to save wits of a certain amount. and all covenants to indemnify the sheriff from all escapes by him if they had been in two instruments the former would be void the latter good and the rule is the same tho, in one instrument

So a person gives a bond to a sheriff for a debt justly due him and also for ease and favour. But the latter is void by Stat. If there had been separate the former would have been good but being joined they are void, 2 Mod 351. 1 Pow 200. 1 Ben 237.

The reason is this the diversity does not arise from any inherent difference between illegality by common law and by Stat Law. But it arises from the phraseology and standing of the Stat for it is always in prevent's language. as, that every bond given on usury shall be void. i.e. the whole shall be void, 1 Ben. 237. 2 Mod 351. 1 Pow. 200.

But tho, no illegal contract creates a right the law will permit it to prevail by requiring the other party to execute it, in other cases the law will require him, who has paid to recover back, what he has paid.

When the illegality is such that both are deemed criminal if the unlawful act stipulated is done he who has paid for it cannot recover it back, for "in pari delictu potior est conditio defendentis"

But when the party paying it wants to recover it back before the act is done he will be enabled to prevent it for he takes the locus penitentiae Doug 468. 428. Buller 131. 2, Salk 22, Cowp. 790, 1 Bos & Pullen 298. 8 T.R. 578. 2 Burr 1012.

The principle of the distinction is incorrect, for it should be that he who has paid money for the doing of an unlawful act should always be permitted to recover it back never

4 T.R. 335. This is Lord Kenyons opinion.

It has been decided that money deposited on an illegal wager and paid over after the event happens, can never be recovered back it may be before the event. Hampshire, Doug 646. n. March, 525. 1 B&P. 3, 298 8 T.R. 575.

There are many subordinate rules on wagers which I shall illustrate under the letter of Assumpsit.

On the above principle if money is advanced to A. to procure an office it is recoverable back before office procured but not afterwards. So if money is paid on an illegal policy of insurance. The money before the risk run may recover it back 1 Por 202.-5-7. Doug 471. But not after the risk run. But this distinction holds only in cases of parties both in equal degree criminal

But when a party who has paid money on an illegal contract is not particeps criminis he may recover it back without reference to the question of the act being performed or not. For it is a gen. rule when the law prohibits a contract for the protection of one of the parties to it that party can recover back what he has paid, so on this principle one may recover back what he has paid on an usurious contract, Doug 451, 671. n. Ther 915, 4 T.R. 561. 1 H Blk. 65. Cow 791.

It was once held that one paying an usurious contract could not recover it back this doctrine is overruled and explored. Salk 22.

On the same principle money paid to a Creditor to sign a Bankrupts certificate may be recovered back 1 Por 205.

But it must be observed that a security given or promise made in consequence of a previous transaction prohibited by positive law. is not consequentially void as if one of two partners of an illegal transaction is in surrency buys all the lots and the other promises him to pay his part again

a security this contract is good 4 Burr 2609. 3 T.R. 422. 2. H Blk 879. 6 T.R. 61. 405. 2 B&P. 372-3. 7 T.R. 630.
The contract prohibited is that of the circumstances that has passed. And this sub contract to reimburse is one step removed from the illegal contract for the payment of losses is not unlawful. nor is the sub promise unlawful nor does it tend to any thing against law. here the pretty pretty is regarded as lending to the other, the amount of his moiety. It has been held that if the partner paying the whole does it with the privity and consent of the other, but without any express promise to reimburse yet he can compel him to pay his moiety. 3 T.R. 418.

This case has been so shaken that it may be considered as overruled. It appears to me that the rule is incorrect. for they were not bound to pay the loss. here the one paid for the other, what he was not bound to pay.

Where one makes a contract the making of which is illegal without reference to the performance he may be bound by it tho he can never claim a contract. C.P. Bq. Stat. 21. Hen. 8th It is an offence for a clergyman to trade yet should he engage in trade he would be bound by his contracts to pay. but cannot compel payment a debtor. 1 Atk 140, 144. Lit. B. 19. or contracts payable to himself. Here it is not the contract that is void but is the making of the contract, by the clergyman and the object of the law is to impose restraints upon him. but should he be discharged from his contracts to pay others he would have an indemnity under the Stat defeating the object of the Stat. On the same principle if one is concerned in smuggling he is still bound as trader under the Bankrupt laws. 1 Atk 189.

contract illegal and negatory are void for no advantage can arise from them and the law will not lend its aid to an insignificant transaction. 1 Vor. 231 2.
A contract wantonly effecting the peace of a third person as if a wager is made that J. S. has committed such an act &c. Cowp 729, 735. 3 T. R 699. and it is a decision of action to a wager that the event must be proved, through the medium of a person innocent 3 T. R 700. 1 Vow. 233.

Contracts must be certain. This rule relates to the terms of the contract, and requires that they be so understood & defined that the intentions of the parties may appear distinctly Co Lit. 250. 1 Bulst 72-7. Hob. 69. 1 Keb or Hob. 776. as if one contracts to deliver goods to A. in a short time the contract is void, I think at the present day. the question what is a reasonable time will be left to a jury to find.
A promise to pay money generally is sufficiently certain for by construction of law it is a promise to pay presently such is the penal part of a bond. 7 T. R. 124. 427, 1 Vow 80.
It is however a rule of law, that if one promises to do a collateral or specified act and no time for performance mentioned the party has his whole life time to do it — I cannot say this as a reasonable rule and think it might be better that he should, when I speak of any collateral or specified act I mean any act other than of payment of money. "Id certum est quod certum reddi potest" is the maxim regarding the certainty of the terms of the contract, as if I promise to repay A, whatever sums he may have advanced for me. This bind me, because by calculation these sums may be rendered certain. pop 148. Co Ca 174, 1 Keb 56. 65, 1 Sid 270.

Of the Nature and Kinds of Contracts

First they are either executed or executory. 2 Bl. 443.
A contract is said to be executed when the parties thereby property to each other with delivery of present possession or with a present indefeasible right of future possession as if goods are sold delivered and paid for. which is a transfer with immediate possession. But if one Lease land under a lease sells the reversion. the contract is executed. 2 Blk 443. 1 Pow 234. 158-9. 175.
Executory Contracts. are those by which no property passes. but is a transaction by which property passes in future.
All Contracts are either Express or implied.
Powell has divided them into express. construction and implicative but his implied, is only a species of express.
An Executory contract is one in which the parties expressly stipulate what is to be done or omitted. 1 Pow 236.
Powels construction contracts are such as arise out of express contracts by legal construction, and are different from what the Express contracts primaria imposes
1 Pow 236. 1 Leon. 122. 1 Pow 237. 1 Eq Ca. 652.
When are cases in which clauses, in the deed, of exception amount to a covenant. 1 Pow 238-9. Co E 657.
But the covenant is express. in the above case.
A reservation of rent in a deed ~~is~~ ~~and~~ indented amounts to a covenant to pay it. and is what Powell calls an implicit Contract, but the covenant is express 1 Lev 18 Cro Jac 399. Stra 407 Co E 657.
A lease without impeachment for waste is a grant of the trees. 1 Pow 243. Hob. 132. Yet this is one of Powells construction contracts, 1 Pow 243. Hob 132.

Implied Contracts are those which are neither expressed in terms or raised by construction from the terms. But are those which arise from the nature of the contract and all contracts which do not come within this definition are Express. 1 Pow 245-6.

If the owner of goods delivers them into possession of another to be kept the law implies a promise by the bailee to keep them with reasonable care 1 Pow 246 to 256.

One case of importance is this if the Lessee holds over the term i.e. after its expiration, without opposition from the Lessor he is regarded by the law as tenant from year to year. 1 Pow 135. 258.

Contracts are Absolute or Conditional.

An absolute contract is one that binds the party unconditionally without qualification.

Conditional Contracts are those of which the obligation depends in whole or in part on some event which is to take place to be defeated, enlarged, or abridged. 2 Blk 152. Co Lit 201.

Thus if A agrees to purchase land on condition that B returns from India on such a day this condition suspends the obligation to purchase until the event on which the purchase depends happens. 2 Blk 154. Co Lit 201. Perk § 712. 1 Pow 259-60.

If A agrees to pay to B. so much as his farm is worth and C shall decide the worth. the obligation is suspended until C decides. and then he is bound. It becomes absolute Dyer 91-6. 1 Pow 261.

The effect of Unlawful Conditions

The effect of such condition varies according to the nature and condition.

First, If an unlawful condition is annexed to an executory contract the whole contract is void. Thus if one is bound in an obligation conditioned for the performance of an unlawful act, by either party the bond is void. As if A gives a Bond to B. in a penalty of $1000. conditioned to be void if he (B.P.) publishes a libel. the bond is void tho. the act is to be done. so is the rule in case the obligor binds himself under a penalty if he omits an unlawful act. Co Lit 206. b. Esp Dig. 175, 182, 185, 1 Pow 201 & 261. —

The rule is the same when the bond is conditioned for the omission of any legal act. as if a Sheriff gives a bond conditioned to be void if he should suffer an escape or omit an official act 2 Vent, 109. 2 Wils 346. 3 Lev. 411.

The same is the case when the condition violates a maxim of public policy the condition having this inherent quality the whole condition is void. 4 Bac 2225. 1. Ph Ev 181. Esp Dig. 183. to 185. The Law in these cases destroys the contract to prevent the performing offer acting as an incitement to commit the unlawful act.

Conditions in a Contract Executed

But if an unlawful condition was annexed to a contract executed, the condition only is void and the body of the contract good. Then the law cannot interfere and prevent the completion of a contract. for it is a study executed, voluntarily by the parties Thus A grants an annuity to B and annexes a condition that if B. fails to cut an

unlawful act the estate shall be forfeited here the conveyance is binding, tho the condition is void the grant is the same as if no such condition had been annexed. Co Lit 206. b. 2 Blk. 157. 1 Pow 201-2. Where the rules in Executed and executory contracts are entirely different and their effect is the same. into remove the temptation for as in the former it prevents the contract thereby removing the inducement to the act to save the penalty, so in the latter it equally destroys the inducement by removing it, in rendering the contract binding without the performance of any such subsequent condition.

When rules suppose the parties to be perfectly sincere, so that even in executed contracts. If the grantee is not particeps criminis the law for his protection will rescind the contract, As if A mortgages his estate to secure an usurious contract, here tho the contract is executed as the legal title passes, yet the contract will be rescinded for it cannot affect the mortgagee under the Stat of Usury. Cowb. 791. Doug 451, 671, n. Stra 915. 4 T. R. 561. Bur N. R 132. 1 Pow 202-4.

So also an executory contract done in violation of marriage void 4 Bur 2225. Esp Dig 183-4. 2 Ves 344. 2 Ven 109.

So also a bond given as a temptation to prostitution or seduction is void. being against morality for as it is executory the law will not enforce it. but a bond given for a pecuniary mistake out of the above nature is good 8 Bur 1568. 1 Bl. R. 517. 3 Wils 339. Esp Dig 182-3. 2 P. Williams 432.

Repugnant Conditions

All conditions repugnant to the nature of the contract are void. Thus if A enfeoff B. with a condition annexed that if he should alien the estate should be forfeited, the condition is void, for it is totally different and repugnant to

the estate granted, for the power of alienating is an inseparable incident to an estate in fee. So also if the condition had been that he should not take the profits &c. it would be void for the same reason. Co Lit 596. 2 Bro 233. 1 Pow 202.

But a bond or covenant by the grantee that he will not alien or take the profits is good & valid. for this does does not restrain him of his right to do the one or the other. And if he does either the one or the other, he will be liable only in damages on the bond or covenant, in such case.

Impossible Conditions.

Connected with this subject are impossible conditions. and these are so either at the time of the contract made or rendered so by matter ex post facto. 1 Pow 264.

If a condition possible at the time of the contract made is afterwards rendered impossible by the act of God, or of the Law, or if it was annexed to a contract executed, the contract is not effected by the non performance. As if a grant an estate in fee to B. conditional that B shall within 6 months go to Europe for A. & B dies, within the time without performing the voyage the non performance is rendered so by the act of God. and has no effect. thus the grant becomes absolute. 1 Inst 206-b. 1 Pow 264. 444-6.

I mentioned, not long since that if a covenanted to convey to B. in South Carolina a cargo, within a given time, that A was held liable on the covenant tho he was prevented from performing by inevitable accident, as shipwreck. And I then mentioned that. If he had been in this case bound by a penalty, the inevitable would have avoided him.

And the rule is, the same if the conditional to an

executed contract is rendered impossible by the grantor or the party claiming under him of its performance* The principle of the rule is, that as the interest is vested in the grantee the law will not deprive him of it under a penal condition unless he is in some fault. all the above conditions are penal as they would work a forfeiture.

* 3 P Williams 218. 3 Bro Rec. Ch. 389. Salk 198. 8 Mod 51.

As if A grants an estate to B. on condition that B marries C. within 6 months, and within that time A. marries C himself. The condition here is rendered impossible to be performed by A. and the estate is absolute in B. ibi supra

But if a contract Executory with condition possible at the time. but becomes afterwards impossible by the act of God or the law, the obligation is discharged, and the rule is the same if occasioned by the act of the obligee. Salk 170. Cowp. 209. 7. T.R. 384, 1 ib 639. Doug 659, 2 Hen Blk. 126.-8

Here no advantage can be taken of the non performance of the condition until the obligor is in fault. so that it is different from the case of an Executed contract, As if A gives a Bond to B. conditioned to be void if he marries C within 6 months, If within that time B marries her then the whole contract is void. but had this condition been annexed to a contract executed the condition only would be void 2 Saw. R. 240, Co E. 374. 8 Co 92, 1 Pow. 417.

In both Executed and Executory contracts. If he who is to perform the condition disenables himself to the condition will have its full operation 5 Co 21. a 1 Esp R. 430. 2 ib. 522. 6 John 10.

The rule goes further and it is held, that when the party disenables himself voluntarily to perform his liabili-

-ty becomes accelerated and he is instantly liable to a recovery tho the time for performance has not yet arrived elapsed. As if A agrees to convey land to B in 6 months time and immediately conveys the land to C. by this act A becomes immediately liable -

If A gives a bond or a bare bond that J.S. shall appear in court, and before the setting of the Court, J.S. dies, A is discharged for it is occasioned per actum dei. qui facit injuria nemini. Salk 170. 265. 1 Pow 265

When an obligee or he in whose favour the condition is inserted prevents or dispenses with the performance, the obligation is discharged, this holds of Executory contracts. & if A agrees by giving a bond binding himself to enter on lands for B. on B's Land, and B forbids him to enter on the Land, or by parol dispenses with the performance then the obligation is discharged, and tho by such parol dispensation, the discharge is sufficient, for such evidence is admitted to defeat a penalty, Ld Ray 68. or 688. Stra 1236. 3 T.R. 590. 7 ib 383. 1 East 618. 1 Ests R 53. 1 T.R 638. And if the act of a stranger is made necessary by the terms of the instrument as evidence of the performance, & such stranger refuses to act, the contract it appears cannot be enforced. for if the party consents to its being proved by a certain stranger he must abide by his agreement 2 H. Bl. 574. 6 T.R. 710. 5 Co 23. b. as in the case of a policy of insurance against fire, there is often inserted a condition that the underwriters shall not be liable unless the fact of the loss is certified by the parson of the parish. and here should the parson refuse to certify to the fact - no recovery

could be had against the insurers.

If a Bond is conditioned for the performance of one of two things in the alternative and one becomes impossible of performance it was formerly held that both were discharged & then the obligor had no longer his election which was deemed essential 5 Co 22. Salk 170. But it is now held that the other must be performed 1 Bos & P. 242. As if A agrees to convey land or a house and the house is afterwards burnt he must convey the land.

So if the condition of a Bond becomes partially impossible by the act of God or the law the obligor is bound to perform what is possible and this saves the penalty. As! If A agrees to convey a house and a quantity of land to B. and the house is consumed by lightning it was anciently held that he was discharged but it is now settled that he must convey the land & suffer the penalty Co Lit 219. b. 352. 2 Blk 731. 2 H Blk 581. 2 T.R. 254. 1 Ves 448-51. 2 ib 31.

If a Contract contains a clause making the party bound the Judge whether the condition is performed. the clause is void for that is a question belonging to the jury. 2 N.R 408. Parol evidence of the performance or non performance may be admitted, es auct. This is a new rule and the case is new. And in analogy to this rule it was decided in Pennsylvania, That if a Contract to pay approved notes for goods the vendor cannot arbitrarily refuse notes proved to be good. The Court, held that it did not mean such notes as the vendor should approve but such as are of approved credit,

Contracts impossible at the time of making the contract.

The operation of such condition depends on their being subsequent or precedent. 1st A precedent one is to be performed before the right or estate dependent upon it can vest, a access. 2d A Subsequent condition is one by which an estate is to be qualified or totally defeated 2 Blk 156-7, Coke Lit 206.

If the impossible condition is precedent the right or subject of the contract can never vest, for the contract is void ab initio, such condition is not in the nature of a penalty for it avoids nothing but prevents its vesting 1 Pow 206. Fri act.

And it is my opinion that it is the same if the condition precedent is rendered impossible subsequently by the act of God or of Law. Suppose A contracts to lease land to B. in future, provided B marries C. & Dies, here the condition cannot be performed, tho possible at the time yet rendered subsequently impossible by the act of God & here the contract cannot be enforced. So if such an Executory agreement is made to be executed on condition B does an unlawful act here the B does the act the contract cannot be enforced for the condition being unlawful it is as no consideration and no man can acquire a right by an unlawful act. 2 Blk. 157.

But a condition subsequent if impossible has no effect, but the right is effectually vested notwithstanding, for the non performance is the fault of no one, but the one to perform, to suffer by non performance must be in some fault or default, when the condition

is subsequent. — — — — — —

If an Executory contract as a bond. and If an impossible condition is annexed to it it is a cast blank and the bill is single Co Lit. 206. 2 Blk 156-7. Then the penalty of a bond is a debitum in presenti, and a void condition cannot defeat a present existing debt.

But if the Impossible conditions are incorporated into the body of the contract executory instead of being endorsed or annexed to it. the whole obligation is void for here is no preceding penalty creating a present debt, for when there is a present debt, with a conditional annexed the condition is a mere defeasence. but when it is incorporated in the body of the contract there is no distinct part importing a present debt. As if A covenants pay B. £100 provided He will go from Eng^d to Rome in 24 hours Here is no separate claim importing a present debt and the contract is void. But if he bound himself in a bond to pay B £100 with a conditional annexed annexed that if he did not go to Rome in 24 hours the bond should be void. here there is a present debt and the condition impossible. but as it is impossible it is void but the bond good. as a single obligation,

Contracts and Agreements required to be in Writing.

By Stat 29. Carlos 2d.

This branch of the law may well be said to form a entire Code.

I am not now to treat of the distinction between the civil & simple contracts at the Com Law. but of written and unwritten contracts, under the Stat 29th Car 2d. called a Statute of

Frauds and Perjuries

This Stat enacts as to contracts, that the six clases enumerated in it cannot support a suit in Law or in Equity unless the agreement or some note or memorandum of it be committed to writing and signed by the parts or his agent only authorized 1 Bat 72 Gil. agent 2 Blk 159, 1 Pow 270.

The clases are as follows, viz

1st Promises of Exect or administr to answer out of their own estate for any debt or duty of his testator or intestate

2d. A Promise by one to answer the debt, default or miscarriage of another.

3d. Promises upon consideration of marriage.

4th Contracts for sales of land, tenements, & hereditaments or of any interest in or concerning them. The words "Contracts or sale of land means a sale of land or a contract for the sale of land.

5th Contracts which by their terms are not to be performed within a year from their making. This has nothing to do with the time of bringing the action

6th Contracts for the sale of goods for the amount of £10 or upwards. This clause extends both to executed and executory contracts for the sale of goods if of value £10. 4 Y.R. 14. 2 Y.B.R. 63. Robt Stat of Frauds. 111

There is a qualification of the fourth clause, making a distinction of a parol lease of a term of three years and one for more. The former is good tho by parole. The latter is to observe the requisites of the Stat. But by recent decisions in Eng. a parole lease for more than three years is considered as a tenancy from year to year. 4 Y.R. 680. 3 A. 16. 8 ib. 3.

I presume that the object of this Stat is to prevent contents of the above description from being proved by parol testimony. It is supposed dangerous as it afford opportunities and temptation to fraud and perjuries

As to the 1st clause. It has been held that if an Exec. or Adm. having assets of the testator a intestate and promises to pay he is bound. but if he has none he is not bound by his promise, 1 Ves 125-6. 1 Y.R. 8.

This point has never been precisely decided, nor has it ever been directly denied, since there has been no case touching it precisely. But it is clearly unsupported by every reason. Authorities questioning it. Treat 873. 7. Y.R. 350. Robt Stat Frauds

The reason assigned is that if he have assets there was a consideration advantageous, to himself therefore transferring the debt to himself, 1 Ves 125-6. 1 Y.R. 8.

This reason is untrue in point of fact, for possession of the assets by the Ex. cannot transfer the debt and make him personally liable, he is liable only as Ex.

and judge vs him de bonis testatoris, But if he were liable in his individual capacity the judgt. would be de bonis propriis 2d. reason is that they constitute a consideration. but the Stat. has nothing to do with a consideration, for that is a question at the Com Law. all the Stat intends is to introduce a new rule of evidence & If a parol promise on a valuable consideration is good the Stat is repealed. for a promise without consideration is void at Com Law. And it was held by La. King & Kenyon that when the Exec. had assets the law would raise an implied promise, to pay by the Exec. and that his person and, in dividual property was bound Cow. 288. But this is denied 7 J. R. 350 - In 5 ib 690. Fallon 404.

And it was once held that when Administrators submitted to arbitration. the mere act of submission implied a confession of assets for the payment of the debt. But this now is properly overruled. vide the old case 1 J. R. 691-2, denied by 6 J. R. 6. 7 ib 453. Toller 465.

But an award agt. an Exr. or Admnr. by arbitrators that he shall pay the debt is binding for the award is conclusive upon him, that he had assets to that amt. 2 J. R. 453. Toller 465.

It was once held that the payment of interest by the Exr. on a debt due from his testator, was an admission of assets to pay the principal. It was then unavoidable throwing the onus on the Exr. But it is now overruled 5 J. R. 8. Toller 404.

I have introduced this doctrine of assets here because if the the Exec. has not assets, he is not bound by his promise on the he had committed it to whatever motive it mght. -ated by some other sufficient com. Law consideration.

An acceptance of a Bill of Ex. by the drawees Exec. is an admission of assets. to the amount of the bill. for his acceptance is according to the terms of the Bill. and if not so the person, in the course of its negotiation would be defrauded 1 H Blk. 622, 3 Ves 1, 2 Bur 1225. 1 T.R. 487, 2 Stra 1200. Ch.B. 182-3

On the same principle a transfer of a Bill by the Ex. of the holder is an admission of assets to pay it if it should be dishonored by the prior parties to it. for a transfer always implies a promise to pay it in this event. 3 Ves 1. 2 Stra 1260. Ch. B 111-12,

The agreement must be committed to writing &c. but the Ex. is not bound unless in the writing a consideration is shewn. and one sufficient in law.
Assets are a consideration and unless he has assets or the promise is made in consideration of forbearance of the debt his promise will not bind him the fact of his testator indebtedness is not sufficient 3 T.R. 350, n. Cowp 290, 7 Br. Par Ch. 551. Salk 404. Rees 125.
——— The Stat. requires only those agreements to be in writing. which, were binding on the Exec. at Com. Law when made by parol, 7. T.R 350 n. 1. n. 1 Ves 126 Roberts Stat Fraud 202,
In order to bind the Exec. on his written agreement there must be an existing claim or have been an existing one which originally bound the testator, otherwise there can be no consideration. Suppose the ordinary consideration, of forbearing of a suit if there was no debt when the suit was threatened a the Ex.

is not bound by his agreet. tho in writing for it is void wanting a consideration. 2 Leon. 136. Rolt. 206.

To bind the Exr. the consideration must appear in writing, as well as the promise and this is a rule common to the Jewi first class, for in them the Stat require the agreement or note a memorandum thereof to be in writing, and the Courts hold that the word agreement includes the undertaking not only, But the consideration of it. But the old opinions are that the consideration might appear, although I.C. might be shewn by extrinsic evidence and this is the rule as to the 6th class as will soon appear. 5 East 10. 6 Ib 307. Rolt. 110. 217.

But to take advantage of this clause in the Stat. the Exr. or admin. must have been sued when he made the agreement, here when one of two claimants to the right of administration agreed to give the other a certain sum provided he would relinquish his claim. Or if he for the same consideration promises to pay a debt, and from the intestate, in such case he is bound tho it is not within the Statut I.C. he is bound if there is not the objection that the agreement is not committed to writing. Comb. 330. Rolt. 201.

Second class, any agreet by one to answer for the debt default or miscarriage of another must be in writing with by note or memorandum 4. The question under this head is, what kind of contracts are meant as contradistinguished from other

contracts made for third persons. Then it is a rule, That all promises made this class to be within the Stat. must be collateral. for promise made for another in the first instance, originally, are binding without being committed to writing, and of course are without the Stat. 2d Ray. 1087. Cowth 227. 1 Wils 306. 3 Bur 1888. Cro Eliz 101-2.

The words "collateral" and "original" are not in the Stat, but are introduced to ascertain what contents the Stat includes. By the term "original" is meant an agreement not to answer the debt of another ones own debt, collateral means to answer for the debt &c of another.

Of Original promises there are Four Classes;

1st When the third person for whose benefit the promise is made is not hereby liable at all to the promise for the debt or duty. 3 Bur 1921. Bul N.P. 281. Peak Ev. 212. Robt Sta Frau 209. 216.

But when the promise is merely in aid of a subsisting liability for the same debt or duty, &c on the part of the third person, or to prevent false credit; it is collateral. hence within the Stat, Or when the promise made by one for the benefit of another is merely security and remedy for a debt or duty existing of his. it is collateral for then the agreement is collateral. and made as a guarantee for the performance, 5 Mod 205, 2 Wils 94, 1 id 306. 2 Ray. 1085-6. Peakes evidence 212. Cro Eliz 101-2. 1 Bos & P. 158. Cowp 460. 1 H Blk. 120

This definition will not be found in any of the Books but is what I have planned from the spirit of the cases. — A says to B. deliver goods to C. and charge them to me. or says I will pay for them, or deliver them on my account, & B delivers to C. accordingly, in either of these cases C is not bound or in any way liable But A is the obligor alone. and the promise is original by him, here the indebitatus ass is created in A. in the first instance. 2 Y.R. 81, 1 H Blk. 120, Ld Ray 1087, Robt Stat. Fraud. 209-16.

But if A had said "deliver goods to C and if he does not pay for them I will. the promise is collateral, for by the supposition C is the original debtor and the promise by A is but a conditional security. 1 H Blk 120, Cow 227, Salk 128, Bth Dig 202, Ld Ray. 1086.

There is a qualified form of agreeing to answer for the debt &c of another, E.g. A says to B. "deliver goods to C. and I will see you paid" here it is not in absolute terms that he will pay. This by some principles is collateral But by the later authorities it is presumed to be collateral only. 2 Y.R 80-1, Ld Ray. 224. 1 B & P. 158. Russ 223.

But a promise by A. that B. shall do an act to do which B is not bound, A is originally liable. A says to B, "Let me a horse and C my debtor shall pay the hire and if he does not I will" here the promise is original for C is not now even one liable. Robt 225, Fitzg 382.

If an Agent purchases goods at auction and does not mention his principal. the agt is bound originally to pay. 3 Bur 1921, Peakes Ev. 213.

And to render a promise collateral it seems necessary
It seems that the one for whose benefit the contract promise
is made should not only be liable on the same consider-
-ation but that he should have been so at the time the
promise was made. Ld Ray 1085-7. RSV 217-22-32, - - -
And the liability of the person must be on the same
contract on which the promise was made, to render
the promise collateral E.g. as Goods are delivered to C at
my request. by which promise I am bound originally, should
& subsequently promise to pay for them. I am not
exonerated from my original liability for when I became
debtor C was not the debtor,
But if one of several persons already liable promises to
pay the whole the promise is original and not within the
statute, as where a Bill of cost is received as B.C.&D. &
B in consideration of forbearance promises to pay the
whole, he is liable and it is without the Stat, for it is not
a promise to pay a debt for which he was not orig-
inally liable, 5 Mod 205. Cowl 302, 2 Cowl 325. 5 & 6 Mod 213.

On original promises thus considered under the Stat. the
proper action is indebitatus ass.t not stating the special
agreem.t for the promise is the original debtor

But when the promise is collateral the action must
be had upon the special covenant, for Debt or Indeb.
Assump.t will not lie, since he is not the debtor but the
guarantee of another, 1 Bur 373. 3 Lev 303. Ld Ray 185. RSB 216.

The 2.d class of original promises is where the liability
of the third person, the originally called is extinguished

subsequent promise and which is the consideration of the subseq.t promise. In this the authorities are not agreed. but the better opinions support the rule.
A says to B. barn the bond which you have against J.S. and I will pay you the debt. here J.S. ceases to be the debtor, and the debt extinguished is the consideration of the promise. by A. 3 Burr 1888. (106 & 108.) 1 N.R 130-1 Rot. 23.
Some holds the promise to be collateral. But I take it to be an original promise, for it is not to pay a debt for which J.S. is still liable but one which J.S. no longer owes. Had A said to B. If you will burn a sheet of white paper I will pay you, so and so. It is enough to take the contract out of the stat. What is the difference if he had said "If you will burn the bond I will pay you.
Any original consideration to the promise is enough to take the contract out of the Stat.
But at any rate when the promisor is the purchaser of a debt his promise to pay the debt a interest is clearly original his promise is not strictly to pay the debt of another but to pay for a thing transferred a delivered, 1 N.R. 130. 2 East 325 Rot. 226

3d. A promise is original when the consideration is new and distinct arising out of a new and distinct transaction and moving to the promisor. So that the debt to the third person is mentioned only as the measure of the debt which the promisor is to pay for another thing. The leading case on this question is Williams & Lakin. (This is a case where the landlord entered on the defeas premises to distrain for rent (It is unnecessary to mention that the landlord has a lien upon all the goods on the premises on rent days) The goods were assigned to A & A said if the landlord would abandon the

he would pay him the rent due from the lessee.
3 Burr 1886. Bull Dig 121. n. 2 East 325. Peak Ev. 213. 3 Esp R 86.
When the consideration of the promise to pay the debt arose out of a distinct transaction which was a benefit to the promisor. This case overrules most speculations. The objection to this suit was that the rent accrued due from the lessee hence the promise must be collateral.
In this case Lord Mansfield arrived at the result of his opinion without going through the intermediate reasoning he said that the Stat had nothing to do with it and that the res gestae was enough to support the action Suppose the Landlord has the entire property in the goods and the promisor said I will pay you for them B d rent. This is equivalent only to saying I will pay you for them and give you such a price this is an original promise without relation to a third person. But in the goods the promisee had a qualified property which would equally support such a promise and the reference to the lease is but ascertaining the price.
I fully concur with Lord Mansfield in his opinion.

4th class of Original promises is When an unexecuted obligation to pay for a benefit received by another promises to pay the promise is original. E.G. a Pauper of a Parish being sick applied to an apothecary for medicine. The overseers afterwards promised to pay for it. Then the pauper was not liable & indeed the overseers were bound to pay for the medicine if it was necessary Bull N.P. 281. Peak E. 213.
Hence this class touching the Stat. There are a few miscellaneous rules.
First. A promise to pay money a certain prem. to the promisee

in consideration of his withdrawing a suit against a third person, for a tort - if any, kind is original. The great question under this new formula was, whether the promise was made to answer for the defaulter's debt or a D. person, thus making the promise collateral but this question is at last by being settled, thus it is original and it seems it must so be, for it does not appear that the def.t has incurred a debt by the tort until he is tried for, and found guilty, the law presumes him innocent, and admitting him guilty, no positive sum is ascertained. 18 Mass 305, 4 T.R. 204, 2 Day 457, Perkins 214, Rost 208, 233-4.

Indeed to render a promise collateral there must be an existing debt, ascertained against such third person at the time of the promise. By the term "ascertained" it is meant some debt or duty which by reference to some known standard may be definitely arrived at.

But a promise in consideration of the promisee bringing a suit against his debtor is collateral, for then the debt or duty is capable of being ascertained. 2 Mass 91. 2 T.R. 201, Stu 873, agnendis. 8 Bur 1887, Amb. 330.

A Promise to stop a trover in consideration of his withdrawing his suit against the orig. is collateral, for in such instance there is a measure of damages and the value of the good. I think the promise would be original if the action had been brought, for then vindictive damages might be recovered. But in trover all matters of aggravation are waived. 2 Day 445.

Under this clause some have supposed that when between the promisor and promisee a new consideration arises i.e. something distinct from the debt or

due the latter from a stranger is original debt 330
3 Bur 1887. But if this rule was true, the statute
would be repealed for a consideration for such prom-
ise is required at law, as if A forbears his suit
against B, a debtor by promise of C to answer post.
the forbearance is the consideration, but the promise
is cannot be collateral. This question is settled
and it is held by all to be collateral. 2 Mels 94 Bul
N.P. 281-2. 7 T.R. 201. Stra 273 2 Day 457.

But a Judicial confession of the deft excluding
the necessity of other proof will prevent the Sta-
tute of the Statute. Thus a parol promise if judi-
cially confessed will support an action. Rowles R
15 Peakes Ev 204 Robt 238.
Thus if, to an action on a parol collateral promise
the Deft plends a tender the contract will be supported
for, by the plea, the confession the promise and the fail-
ing will cause which the stat. contemplates for
no further evidence is required. And it is to be rem-
arked that the Stat no where says that such contracts
shall be void, but that they shall not be proved in
a Court of Law, or Equity, by parol testimony and
thus the Stat is not violated, inasmuch as it is not
proved by parol.
It is never necessary in an action on a promise to allege
in the declaration that it is writing and such an
averment would be contrary to law. Suppose the promise
according to the proper rules of the State. The com-
mitting the promise to writing does not support
the action but is evidence to support it. Ray 450.

Bul 279. 3 Geo. 1890.

The Statute introduces a new rule of Evidence but not pleading, thus if one brings an action as the debt on a promise made by Testator to answer &c. for a third person and the deft defends the allegation stand confessed, and all proof to shew the promise to be in writing is waived and it is wholly impertinent to shew the contract to be in writing by an allegation for no proof of the fact could be admitted on demurrer, — for it was thereby the Deft. might defeat the action, 4 Ch. R. 350. Comyn 284. 1 Rod 47-8.

Thirdly Agreements in consideration of marriage &c. Must be in writing &c. — or some note or memorandum thereof signed by the party or his agt. duly authorized,

This clause does not contemplate a promise to marry for that is good by parol, But such as are made in consideration of marriages, which mean marriage settlements &c. 1 Bul N. P. 280. 1 Pow. 277. 8 Vin. 34. Lord Raym 335. & 386. 1 Hawk. 179. 1 P. Wms 618. Pre Chan. 526.
There is an old opinion that the promise to marry must be in writing for that reason 1 Leo. 65. 411.

Now it was once held that a parol agreement was good if it stipulated that it should afterwards be committed to writing tho, it never was done. But this was overruled and indeed instead of remedying the contract defeat it exposes it still more to fraud and perjury 1 Pow 279. & 81. 3 Atk 504. Pre Chan 402.

still if such stipulations are made by parol and the committing subsequently to writing is prevented by either of the parties, if the marriage is had without knowledge of the parol agreement Equity will enforce the promise, But this relief of Equity is on the ground of fraud 1 Eq. Cas 19. Pre Chan. 256. 1 P Wms 618. Rob 198. 136-7.

But on the question, what shall constitute a committing to writing. It is held that a letter by one of the parties, containing the terms of the contract is sufficient for no form is necessary 2 Bro. Ch. 32. 3 ib 318. 1 Fonb 179. 1 Pow 237-8. Pre chan 500. 3 Atk. 503.

But when the writing is in the form of a letter containing the stipulations of one party authorised or unauthorised by the other or impeaching none It must be found that these stipulations were conceded to by the other party and that the transaction was in pursuance of the letter. hence when a Father wrote to his daughter his terms on which he should make a settlement on her and her husband. and the marriage was had without the other parties knowledge of the letter it was held that the contents were not in writing for indeed there was but one party to the letter. 6 P Wms 65. 1 Fonb. 179 9 Ellen 3. 1 Powl 287. to-9a Roll 107-8 172-3

But still a letter written by one party to his agent stating the terms of a marriage agreed already made by him and the other party by parol, was held a sufficient memorandum in writing. The former was an offer of terms not seen by the other party. But here the letter ratified an agreement. and this is enough for the Stat. requires form, note or memorandum and the letter is the memorandum, Rob. 121. Perk. 503. -

But such letters must always furnish distinctly the terms of the agreement, for if it merely states a marriage agreement or terms so general that other proof is necessary, it will not answer, Ree. Ch. 560, Ther 428, 1 Atk 12, 1 Ves 290, 1 Ford 179.

Fourth Class, Contracts for the Sale of Lands &c.

In the construction of the word "lands" it is established that if a picture is sold in contemplation of severance, that the contract is not within the Stat. i.e. the sale of any thing in its own nature a chattel as a sale of timber trees, implying an agreement to sever them. So of crops a parol contract is good 6. East 602. Selw 862, 11 East 362, Bul N.P. 282, 1 B. & P. 397.

On a similar principle, a parol agreement between the owner and the occupier of Land that at the time of severance shall have a part of the crops, is good. 1 Bos & P. 397.

On a similar principle a parol agreement to pay for lands conveyed to him by deed has been held by our Ct. to be good, this question has never arisen in Westminster Hall. 4 Bent 9 tho the decision to be correct, 1 Root 77-8. 479.

Here it is obvious that the sale of Lands answers the Stat. and the parol promise is but to pay the money.

The Substance of this claim is, that no interest in land tenements or hereditaments can be transferred by parol nor is an executory agreement by parol for the same purpose sufficient to support a suit in Law or Eq.

But an agreement for the sale of Lands is good, the Stat. notwithstanding. If it is properly constituted with the spirit of the Stat. and the rules of Evidence. It is to be observed that there is

no mate deficiency in a parol contract, all the Statute forbids is its proof by parol. Hence if this can be avoided the spirit of the Stat is answered.

And this is the case First when there is no danger of fraud and perjury in enforcing the contract. It is said not to be within the Stat. Hence if the a Bill in Eq^y filed on parol proximate the Deft confesses the agreement, the weight of authority of is in favour of the Courts enforcing it. There being a confession there is no need of parol proof. But the Stat. says no proof shall be maintained by parol testimony. But here the agree^t is not supported by parol. Ant by confession. 1 Ves 221, 441, 1 Vern 271, 292, Ch Ch. 208, 374. 3 Atk 3, 2 ib. 100, 155 1 Bl Rep. 600. 2 Br Ch. 508, Ant 586. Contra. 1 & 6 Ves Jr. 37, 554. Mr Powell suggests another reason, too strong for a man of his power viz. That being confessed it is in writing 1 Vern 292.

This is a question which has occasioned much dispute. But then mark it is agreed by all that if the Deft. confesses the contract and does not plead the Stat. Ch^y is bound to enforce it Roll 156 161. 2 Brown Ch. 506. Newland Ev. 216. 4 Ves Jr. 23. But I think that his pleading his Stat after the confession can make no difference. The authorities on this question stand thus. Where Ch^y on confession must enforce it, notwithstanding the Stat, Lords Macklesfield, Thurlow, Mansfield & Hardwicke together with Mr. Powell in unison. That if he plead the Stat it cannot be supported by the Statute. 1 Atk 3, Ch Ch. 208, 374, 2 Atk 155, 2 Br Ch. 508, 559 & 564, 1 Bl Rep. 600 2 Br Ch. 507, 1 Ves 170.

Lords Loughborough, afterwards Lord Rosslyn, Eldon & Roll Ch. Sir Eyre Coote, that it could not be supported. 1 H Bl 622, 2 Br. Ch 563-4. Newland 238.

As connected with this question and ancillary to it is another viz whether on a Bill to enforce a parol contract the deft. is bound to confess or deny, or whether he may resist to answer but plead the Stat. merely, Lord Macclesfield held that he must answer. 2 Br Ch 556. Mitfd 211-12. cited and supported by Shelford. The authorities tend, mainly in this as in the last case Robts 156-7, 160, 2 Atk. 155, Harlow says the object of the Stat. is to prevent the Plff from proving a bargain P.C. by evidence not in writing. 2 Brow. Chan. 307, 1 Ford. 170, Robts 157.

Those opposing this say that if he should be compelled to answer it would be a strong temptation to perjury 2 Ho. Blk. Answer this the same answer might be urged in all possible cases where an answer is required to a bill & 2d the Defts danger of perjury was not what the Stat provides against. Thirdly, the objection might be easily urged with the same propriety when the agreement is in writing but no one ever dreamed this clear him. Admitting then that he must confess or deny. It follows, manifestly that if he confesses the Court must enforce it else of what use a recovery, would be the Rule compelling it. I think that the spirit of the Stat is consulted when the parol contract is set aside as unfounded, as the Stat was I have before said does not vitiate a parol contract, on this principle a sale by parol of land at a vendue by the master, under an order of Court - is good. Ho. Chan the land confers in the robes of the officers.

And in all cases where there is no fraud nor perjury in enforcing a parol the contract will be enforced 1 Ves. 220 1 Ho Blk 289, 1 Ch. Ch. 334. and when the deft confesses a debt or damage is received —

but a parol agreement made, too solicitous to enforced against their client for the court say here is no danger of fraud. 3 Br. Chan. 334. Robt. 115. n.

A parol contract concerning land if unfavorable on circumstantial part in proving which there is no danger of fraud & perjury It will be enforced. Thus a grant of an absolute deed has been held to be a mortgage. As if A deeds absolutely to B, but without receiving any money from B, he gives to B an obligation to remain in possession receive the rents and profits pays the taxes, and pays no rent to B. These circumstances warrant the inference that the contract is parol leaving the deed to be but a security Sollee 60. 3 Mod 429. Pow 65. 2 Atk 71. Prec Chan 526 1 V. 11 Ver 881. 2 Ch 549.

Other Exceptions to the general excluding parol evidence are admitted on the ground that to the that was made to prevent or punish fraud & perjury. It must receive such a liberal construction that it will prevent and not encourage it. 1 Blk R 601 Nov 294, -6. 1 Ford. 171-2.

Thus when in a parol contract one party with the request or consent of the other has in whole or in part performed his contract. Chancery will compel the other to perform on his part. 1 Ellen Blk. 600 1 Ves 221. 1 Ford. 172, 3 Atk 100, Ellen 783. 1 Pow 296. Roberts 130 to 138. 3 Ves Jun. 378. 4 Ch 341. 1 Br Ch 417 1 Bro P. 87. Powell says that the part performance of the one is evidence of the contract 1 Pow. 309. The rule is good but has been perverted by Powell's reasoning

for every particular. If the agreement must be proved by parol.

So when possession has been delivered to the vendee, the vendor can compell him to execute a lease and pay the consideration 1 Pow 299, 300. Pre chan. 16, 159. 2 Ves Jr 363. Stra 783. 3 Bro Chan 409.

It was once held that payment of part of the consideration money on a parol contract took the case out of the Stat. 3 Atk. 2. 1 Ves 83, 222, 1 Forb 175, 1 Pow 304-5 4 Ves Jr. 720, Pre chan. 500 or 560.

But this seems now overruled and it is held that the payee is subject to an action of Ind. Asp. having this remedy. The Court say there is no danger of fraud by enforcing to enforce it 2 Eq Cas 46. Dyer 47 to. 8. 74 to 81. Com Dig 82. 9 Ves Jr. 234. 1 ib 22 a 221. 5 ib 32-7. 1 Maxdx Chancy 302-4

It was once held that even payment of earnest money took the case out of the Stat. But it is now fully held to be in no sense of the word part performance Pre Chan. 560. 1 Forb. 175.

Powell says in this case damages for non performance may be recovered. But this is beyond my comprehension. for if damages could be had at law it would be on the footing to hold a contract good at law. But this contract is not good. If he had said that the earnest money might have been recovered he would have been probably correct.

But for a Part performance to take a case out of the Stat. The agreement must be such that by a non performance by the other, the one having performed would sustain an injury. Hence a

part performance by one does not enable the other not performing to enforce the contract for he is prima facie benefited by the non performance than otherwise, 6 Br. Pre chan. 45. Ritts 138, 152 & 162, 7 Ves Jr. 341. Further the part performance must, to take it out of the Stat, be such as the Court would presume did not have been done without the expectation of full performance on the other side, 2 Br Ch 561, 1 id 412, Ritts 139, 151 to 162. 3 Atk. 4. 1 Pow 309. Ambler 526.

Delivering possession is sufficient part performance but directing a Surveyor to draw a deed surveying the land is not enough 21 Maxwy 303-4. 1 Ford 175 Ritts 139-40. 152, 1 Bro Ch 412, 3 Ves 89, 379, 6 id 41.

In case of contract in consideration of marriage the act of marriage is not per se a sufficient part performance, as the instrument is none to take effect until the consummation of marriage is had, and indeed if it would take the contract out of the Stat this clause of it could be executed, Pre chan 561, Stra 738. 1 P Wms 618. 1 Pow 309, Ritts 146-8

Still if the parties to the marriage are not the parties to the contract the marriage will take it out of the Stat, provided it was had with the consent of the objecting party 2 Ves 373, 1 Pow 297 2, 97 to 99. 309.

The felling of timber in performance or pursuance of a marriage contract has been held a sufficient part performance 2 Eq. Ca. 29. 1 Pow 304.

On the same principle to prevent fraud Parol Evid

-ence may be admitted to contradict a written instrument provided it goes to detect fraud in its execution. Thus if agent to mortgage his estate to B. to secure a debt, A executes an absolute deed to B. and B contrary to his duty & in agreement refuses to execute to A. upon payment of defendant. Here the parol contract was admitted to be proved tho it disputed the deed but it was admitted to detect fraud. 3 Atk 389. 1 Ath 188. 1 Pow 620, 1 Eq Ca. 26 n 423. 1 Pow 294. Ridl 130-1.

So, a parol contract of any kind may be proved tho it is only an inducement to support an action for fraud.

Sometimes the parol agreement may be admitted to detect a mistake in a deed. thus if A meets the person to draw a conveyance of one hundred acres of land and he draws up for two hundred. here if A signed without knowing of the mistake he was permitted in a Bill to equity to shew the parol contract.

When Fraud is detected in the execution of an instrument, it is fatal to it both in Law and in Equity. When a mistake only it is good in Law, but may be rectified in the Court of Equity. for in neither case is it the deed of the parties in Equity 2 Ves 376. 6 T.R 671. 1 Ath 188. 1 Pow 433. 3 Atk 389. 2 ib 203.

The words of the Stat. are that no parol contract for any interest in Lands will support an action Law or Equity unless the agreat or some note or memorandum is in writing. Yet by Stat 11 Geo. 2. Ch. 19 sect. 8 parol will be received and accumulative on a parol lease and evidence of

the rent reserved may be given by parol 8 Ld. 327. 2 Bla R. 1249. 1 Ld. 378. 1 Mod 314. 1 H Blk. 235. Esp Dig 20. 165.
This action is called Assumpsit for use and occupation.
But this (State even) action even before the Stat 29 Car would not lie at Com Law Hard 34. Esp Dig 20. Hob. 284. 1 Ch Plea 97. Bul NP 137. Peakes Ev. 241. 2 Com. on Contracts 509.
This action is in use in Connecticut as a rule of the Com Law, and I presume it prevails thro' all the States. 4 Day 228. —

Fifth class, Contracts not to be performed within a year &c. &c. Must be in writing &c 1 Pow. 276.
This class of contract is already not to extend to any agreement concerning Lands or tenements 1 Bul 154 1 Pow 276.
A contract for the sale of lands beyond the expiration of a year is within the time. The reason of this is that the Stat has already provided for such contracts.

But a contract which by its terms is to be performed upon a contingent event which may or may not happen within a year, is not within the Stat and is good by parol. Thus if A promises to pay B $50 on the return of a ship from the Indies the contract is good by parol if the ship could have returned within the time Salk 280. Bul NP 280. Stra 506. Peakes Ev. 214. 3 Bul 1278. 3 Salk. 9. Ld Ray 316-17. 673
So a parol contract to pay B a sum of money on his marriage is good for he may marry within a year. Ld Ray 316. Rolle 187. 3 Bul 1278. Bul 28. Relate to an executory which ide.

Neither is it necessary that the contingency should happen within a year. It is necessary only that it may happen

And it is the terms of the contract, and not the contingency which decide whether it is within the Statute. La Roy 317. 3 Bur 1281

The Stat extends only to contracts which by their express terms are not to be performed within a year. 3 Bur 1281. Peakes Ev 214.

Sixth class Are contracts for the sale of goods of the value of £10 or upwards. They must be in writing &c.

This class requires no distinct consideration except that in this that the consideration need not be in writing for the Stat requires the promise or undertaking only to be in writing 6 East 307.

There are various important rules relating to no one of the classes particularly but to two or more &c. But first I premise that the construction of the Stat. is both the same in Equity as in Law, hence a construction in one Court is a precedent for the other. 1 Blk R 600. 3 Blk 430-1. 1 Ferb 22. And this is a general rule in relation to all Statutes and in such case it would be absurd to say there could be two modes of construction.

The Stat in the five first classes requires the AGREEMENT to be in writing &c.

And 1st What is an agreement?

Any writing which furnishes the evidence of the contract is an agreement in writing & a note or memorandum of it. Hence any writing in whatever form it is if it furnishes the terms of the agreement, and is signed by the party; Hence a writing wrote by one party and signed by the other or his authorized agent is an agreement

if it contains the terms. But if the writing is one acknowledging the terms of a prior agreement by Mr. Parol It is then a note or memorandum. 2 Ve Chan. 32. 3 id 318 3 Atk 503. Robts 156. 2 Ves 322. 1 id 201.

Tho the terms of the contract committed to writing do not make the contract sufficiently certain to all particulars. Yet if there is a reference to other documents or other extrinsic facts that will make it sufficiently certain, it is sufficient, As: If it is by writing agreed with B. to convey to him a tract of land described in such a deed this is enough "nam id certum est quod certum reddi potest" 3 Brow Chan 318. Robt 107. 115. 2 B & P 238. 1 Ves Jr 330. But in this case had the deed been insufficient to describe the subject of the contract or if to any extrinsic matters or facts reference to render the contract certain is not sufficiently certain, the Contract is void for uncertainty. for reference can be made to nothing but those referred to. 1 Ves Jr 326. Robts 108. n.

Also when the agreement of the parties is in a letter it must appear that the opposite party accepted the terms of the letter 2 P Wms 65 1 Pow 237 n 287-8 Robts 107-8. 9 Mod 3. Yet an advertisement written & printed by one of the parties containing the terms is a sufficient note or memorandum if accepted by the other party. As if one should advertise that he had made such a contract. 1 B & P R. 599. 3 Bat 1921.

In All except the 6th class. the consideration* as well as Promise must appear in writing, this is already explained 3 East. 10. Ch 307. Robts. 247. 116-17. 3 John 210

* vide Notes Page 491.

The following is an important rule. That if the contract is in the form of a deed and signed as such, should fail to take effect as such by some legal defect, it is a written agreement and like every other writing speaking is evidence of an agreement which equity will enforce. Hence, tho the deed fails at law, yet it is considered by which the Plff by Bill in Eqy can obtain an good at law. 2 P Wms 242. Robb 109 —

The Stat requires further that the deed or agreement be signed by the party or his authorized agent. and this is satisfied whenever the same is done by the party or his agent if done with intent to authenticate it 11 Ves 118. 2 Eq. Cas. 32 1 Ves 6. 3 Atk 523, 1 Pow 283-4. 1 Hoad 164 Esp Dig 23. 2 Bd. P. 238. 1 Esp R. 190.

But if the name when introduced at the commencement or in the body of the instrument, is not intended to authenticate it it is of course no signing and whether it is so is not answer upon the manner in which it is introduced 1 P. Wms 771. 1 Pow 288. Robb. 121. 1 Hoad 166-7.

It was once held that if a party made an alteration in a written draft in his own hand writing that it was a sufficient signing 1 Ves 220-1. 1 Hoad 165-6. Overall 1 P Wms 770. 1 Pow 284 1 Hoad 166. — see succeeding page. marked *

Who must sign? The words are "signed by the Party or his agent duly authorized thereto." Hence it is settled that if the party against whom the Bill or action is best has signed and there is proof of the other party assenting it the suit or Bill may be prosecuted. Thus where A sues on agreement between himself & B. & procured B to sign it

in a Bill vs B it was held sufficient 1 Madd. & Chan. 334 335. Newland on Con. 171, - 155. 1 Br. Ch 564. 2 Ves Jr. 351. 7 id 265. 1 Pow 286. Fugden 64. †

* * ¶ The signature of one as subscribing witness he knowing its stipulations is a sufficient to bind him as to any stipulations contained in writing on his part at whose instance he was called; that whereas the mother had agreed to give £1000 &c. and the Mother subscribed the instrument as witness knowing of this. It was held a sufficient signing by her. Farther she is supposed to have adopted the agreement. So far as it relates to herself at least it is a memorandum of an agreement. 1 Ves. 6 1 Mer 318. 1 Pow 284.

(a prior page)

(this section was accidentally omitted on the other page.)

† And in this case Mr. Powell says it could be decreed to performance, for says he B. acts as his agent. This is a very strong reason, quoating to B. As an agent in this case he does not act for A. but he signs for himself 1 Pow 287. He cites 1 Eq. Ab. Cas. 21. / 1 Ves 82. Roberts 124. to another point,

And it has been held that when an auctioneer subscribes the name to the condition of sale, of the highest bidder it was a sufficient signing for he is both the agent of the vendor & purchaser. 1 Bik R. 599. 3 Bur 1921. Bac 280. But this rule of the auctioneer is of late confined to the sale of goods. But the authorities to this point are not fully settled. 1 Eq. Cas. Ab. 207. 1 P.W. 306. 1 Ves Jr. 344. Roberts Ev. 217. Coutts v. Ver Jr 244. Roberts 175 In Statute of the Enrol 8 Ch. R 151. Indeed the rule cannot be held equally of the other first Clause. Commerce said of the

4th & 6th. The weight of authorities is in support of its being confined to the sixth clause only.
But it has been doubted whether any sale at auction was contemplated by Stat. 1 Bl. R. 600. 3 Br. 1921, Bac. 280.

And one name printed or engraved if by the proper hand of the party and delivered as his signature is good as if had been in manuscript, 2 B & P. 238. Ritt. 124.

And when the signature is by an authorized agent, it is not necessary that his power should be in writing for the Stat does not require it, hence it is an act at Com Law. And the rule here is that a parol authority (Contract) is sufficient to bind an agent in all contracts not under seal, 3 Hill 27 & Ben. Pr. 251.

From what has been said it follows consequently that the identical contract need not be signed i.e. that this is not indispensible, for it is enough that there is an acknowledgment in writing and signed, of a parol contract for this answers the stat. which requires some note or memorandum &c.
And hence it is that a letter containing the details of a parol agreement, written by one party to his own agent was held a sufficient writing 3 Br Cha. 318. Ritt 121. 3 Atk 503.

The bare writing of an agreement without intending to give it authenticity is not a signing. 10 Mass 707. 777. Ritt 121.

Consideration of Contracts

A contract is an agreement upon consideration according to this defence a consideration is the very essence of every contract. It is that an amount of which each party is induced to give his assent 2 Blk 443-4 1 Pow 330.

Consideration are distinguished by the law to be of two kinds 1st Good and 2nd valuable.

Good is that of natural affections between relations 3 Coke 83. 2 Blk 444. 297.

Such a consideration in a contract executed is sufficient as between the parties but as against the creditors of the grantor or him who parts with the property it is constructively fraudulent. 2 Blk 297.

But in gen. an Executory contract upon such consideration cannot be enforced at Law But in Chancery in many cases it will be 1 Ves 427. 2 P Wms 176. 1 Pow 361-69.

A Valuable consideration consists in something of a pecuniary value. as Money goods Labour Marriage &c. and is called valuable in contradistinguishment from a good consideration 3 Coke 83. 2 Blk 297.

To understand the doctrine (between) of consideration we must first know what is the distinction at Com Law. between contracts sealed and unsealed

The Com Law regard all contracts as either Specialty or Simple Hence there can be no contract but there must be either the one or the other. 7 J.R. 357. n. 2 Blk 445-6. 295

A Special Contract is one written and sealed and such a contract is called a Specialty. and all contracts under seal are called Deeds, in Law. Coke Lit 71.

A Simple contract is one resting in parol or reduced to writing but not sealed. There is no distinction at C Law between one resting in parol and one barely committed to writing. However some speak of a difference among whom are Powell, but to anything of the kind the Com Law is a stranger. for a writing unsealed is not counted on as an instrument in the Com Law acceptation of the term. Nor is it regarded in pleading as committed to writing. for the writing is not the contract but evidence of the contract. is and. 2 Blk 455-6, Roberts 99,-

The Courts of Connecticut in part have departed from the Com Law, for it is held that a common promissory note, not negotiable, tho not sealed is a Specialty,

An Executory contract without consideration is not binding for it is a "Nudum Pactum". As if I promise to give B $1000 as to do for him gratuitously but one. I am not bound 1 Pow 330-5. Salk 339. 2 Blk 445. Ld Ray 909. 5 Mk 143. The following is an exempt case. If the owner of goods delivers them to an individual who promises to carry a do some other act with a concerning them. The delivery is a sufficient consideration for the promise. Hence it is that if A. promises gratuitously to build a house for B. he is not bound. But had B delivered the materials for the building and A promised the promise

is binding for the delivery is a sufficient consideration.
So if the Tailor covenants debt & promises gratuitously, it is binding 1 Ld Ray 149. 6 T.R. 143. Dr & Stud. 129.
The reason why the delivery is a consideration is that the putting of one with his good is considered as disadvantageous to him.
To the general rule there is a dictum by Ch Justice Wilmot against the law rule, who says that a contract in writing is good at the common Law without consideration. 2 Burr 1670. 3 Blk 446. This position is too broad. It indeed applied to the case then in issue for it was a contract on a Bill of Ex. by some one of the subsequent holders, and this is the case and it depends on the lex Mercatoria yet as to the original parties on the bill a consideration must be proved. It is negativing that assumes with the proof of consideration. vide Got. Bills of Exchange, 7 T.R. 51. n. 1 Str 341. Ch. B. 4. 51-2. Kid B. 155. 3 T.R. 421. 757. Bul 274. 2 T.R. 71. 1 Hob. 325. if not in Fort. mention. 1 Str 341.
But nothing is more clear than that the Com Law is just the reverse of Wilmots position.
In strict theory of law a consideration is necessary to a specialty. A sealed instrument may be obligatory when in point of fact there is no consideration. Yet in point of law it is necessary. tho. it is necessary in point of law yet the Plff is not obliged to prove a consideration in the case the Deft avers the want of it as to the Plff. From the solemnity of an instrument the Law presumes a consideration. So that the Law considers a consideration of no practical importance Ves 514. 1 Str 232. 3. 346 2 Blk 295. 2 Ld Ray 729. 1550. 1 H Bl 344. 1 Powell 346.

But the rule "that a consideration is necessary to every contract" applies to Executory Contracts, For when a contract is voluntarily executed by the parties it is good as between parties without consideration. If I promise to give A. $1000. without consideration, I am not bound. But if I give A. $1000. in reality he will hold it forever as against me or my representatives, For the law will not recall it if executed, and will not enforce it if Executory, leaving the parties to themselves Doug 201, Stra 958. Esp Dig 557.

It has been said that a condition can arise but in one of two ways. 1st From something advantageous to the party undertaking & 2d By something disadvantageous to him in whose favour it is to be performed. 1 Ros 342. 1 Vesey 336. It has been justly observed by Ld. Mansfield that this rule is too limited Cowp 290-4.

Under the 1st, A in consideration of goods delivered to him by B. promises, this is good for the goods as presumed to be advantageous to him.
But as to the proportionate value of the consideration moving from the one to the other, It is sufficient if the thing moving is of Any Value. Hence a peppercorn may support a promise of any value 2 Ros 213. 2 Lev 213. 1 Wils 230 & 280 2 Lev 518.
But idle insignificant acts are not regarded in any case as a consideration as if one should promise B that he would give him $10 if he would not smile for an hour. Esp Dig 94, Co C. 206. 2 Rol 23. 1 Ros 355.
But any thing however trifling is sufficient. Hence

when one C.D. A. lend to B. B to C. A demanded rent and C said there are the lease and I will pay it, the moving the lease by A. was held a sufficient consideration to support the promise. Cro E 67, 150 Cro Car 70. 1 Row 343.

It has been determined that the mere relation of Landlord and tenant is sufficient consideration 5 Y.R. 375, or 3 Y.R. 573.

2d When disadvantage to the promisor is a consideration. When A. has a bond vs B. and delivers it up to be cancelled on C's promising to pay the debt, here is no advantage accruing from the promisor but a disadvantage accruing to the promisee. Hob 4-5. Cro Jas 342. Cro E 74-5. 849-881. 1 Row 348. 344

As a consequence of the gen rule. This is a general rule. That a promise is not supported by a consideration passed and Executed, for the consideration and promise must be reciprocal the one inducing the other But when it is passed and executed it cannot be the procuring cause of the promise Hence not procured by the promise. When If A. has heretofore given a bond bond for my servant without my request and afterwards I promise in consideration of it to pay him a sum of money, I am not bound. So if one Hermann me a present and I subsequently promise to make him one also, in consideration of it the promise is not binding 1 Row 348 Cro E 741. 885. 442. Ex A Dig 87.95. for in neither case is there a prior debt or duty.

But if a prior is there consideration and the evidence is

executory the promise is good. For a consideration may consist of several distinct parts. Tho the part which has past and is executed can do no good yet it cannot hurt. 1 Ver 349, 350. Cro E 94. Cro Car 409. 3 Salk 96.

I have observed that the rule "that the consideration must arise in one of these two ways is to narrow. And it has been decided and is now settled that a consideration may arise when neither of those facts exist. And the Rule. "That a consideration passed and executed can support no promise" is somewhat relaxed Comp 290-4. Stra 933. 3 Bur 1671-2.

And these two rules will be found, to be adhering the same in effect.

To the exceptions a Either to the second rule or qualifications. — A consideration past and executed will support a promise if there was a previous legal liability on the promisor to do what he undertakes. as if in consideration of a previous indebtedness one promises an action will lie on the promise as well as in the original debt. and for an other example vide 1 Lev 198. a 178. Ray 200. 1 Ver 350-1. Cro E. 138. 3 Bul 1671-2.

So also will the same consideration support a promise. when there was a moral obligation. as when a debt is barred by the Statute of Lim. a subsequent promise by the debtor is good. Comp 290-4 Bul N.P. 281. Peake 213. Cowp Dey 45. 1 Saut 336. 1 Ver 351. 2 Blk 445.

— To the promise of a Bastard Father of an illegitimate child to pay for its nursing & support is good binding 2 Eq. J. 506.

— And a Consid.n past and executed will support a

subsequent promise. If it was had at the promisors request, then the promise attaches itself to the consideration. The in point of fact it is subsequent yet in theory of Law it is made before consideration had, as if I promise J.S. to pay him for bailing my servant at my request. 2 Vent 268. 3 Salk 96. 1 Bow 351. 2. Cab. Dig 95. 1 Hob 336. Cro Eliz 42. 282 a 232. These are the exceptions

It has been determined that a stranger to a meritorious act by another cannot support an action in his own name on a promise made in consideration of such act. For then the stranger does nothing to the advantage of one or to the injury of the other. A promised B. in consideration of his releasing a debt due a" relevis him of a trespass. he would pay such a sum to C. Then C is a stranger to the consideration and neither is he the promisee 1 Bow 343. 353. 8 T.R. 330. Ch 220. 1 Ven. 6. Cro Jac. 87. This rule has by modern determinations been qualified and it is now confined to actions founded on deeds inter partes. So that if A gives a Bond to B. covenanting to pay C. B must bring the action 7 B&P 148. n. 101-2, 3 Lev 139. Cart 77. 1 Lev 235. Cro E 729. But had the contract, here, been by parole C could have maintained the action 3 B&P. 148. 1 ib 101-2. 1 Johns R. 140. Comb 219. 8 Mod 117. I take the reason of this case C by bringing the action is presumed to satisfy the contract of B. who is deemed his agent. But in the former a stranger is if so he's bound that such presumption is excluded,
and B in bringing his action should declare upon the promise as made to himself and proof of its being made

to B. will support the declaration but if he does not so declare he appears a stranger to the cause of action. 1 Bd P. 101.

But it has been agreed by all that a consid: moving from one will support a promise to his near relations As: when A promised B. that if he would prosecute a cure he would pay such a sum to his daughters then the daughters sustained an action on the promise Vent 318. 332. 2 Lev 210. Ray 302. 1 Ow 353.
But since the above late determinations, Relationship is not necessary to enable such one to sustain a suit on the promise.

When Forbearance is the consideration of the suit two requisites are necessary.
1st The forbearance must be for a general or a fixed period
2d It must be of an action to which the party thereunto is liable or at least prima facie so.

As: If A promises B in consideration of Forbearance there the forbearance must be for a limited time at least and the action must be for a debt certain &c for which the promisor is liable prima facie. Lev 206. Esp Dig 95. Ow 353-4.
But if the forbearance is not limited at least there is no consideration to support the promise for the promisor may be deprived of the delay which was his only object or inducement for in one year after the promise the action might commence again. Cro E 19. 455
But if it was for a limited time even for a day it is enough as if it was for a reasonable time

for what is a reasonable time is for the jury to determine under all the circumstances of the case. iii and 8 Mod 8. Esp Dig 95.

2d. The forbearance must be of a suit on which there is at least a colorable liability by the promisor. Then when a mother in consideration of the forbearance of a suit vs her for a debt of her deceased son promised to pay it. The promise was not supported by the forbearance for the in the Case supposed is not even prima facie liable 3 Salk 96. 1 Ros 354-5. Hard 73.

So if one is arrested on a void process, and another in consideration of his release promises to pay. It is not binding, for there is no consideration Esp Dig 94. 1 Ros 355-6.

But where in fact had bought expensive articles as silks and died this Exec. in consideration thereof promised to pay the promise was holden good for the contract by the infants was not deemed necessaries Yet it was not void but voidable Latch 142. Dyer 272.

A promise in consideration of the honour and pence of the family is good in Equity 1 Atk 3. 1 Ros 362.

A compromise of a doubtful right is a sufficient consideration to support a promise in Equity and conclude it will at Law. for at most it is but a bargain of hard 1 Atk 10. 1 Ves 4. 2 Bents 353. 2 Ves 284. On this principle the important case of Battinson and Penn. was determined and La Chancellor holds the agreement was a sufficient consideration to support a promise 1 Ves 450.

And it is not necessary for a consideration that be expressed in Express terms as a consideration it is enough

if the terms of the contract furnish one by construction or by fair implication Pow 368.

Forms of Consideration.

1st Contracts in relation to the forms of their consideration are divided in three classes.

1st — When that which is stipulated on the one side is in consideration of a promise on the other, here the consideration, not the promise, is termed Mutual, as if I promise B to pay him for doing a certain act for him by the performance of B is a condition precedent. Vent. 147 214. 3 Salk 75, Hob 106, 7 Co 10. 1 A.R. 240. n. 1 Pow. 357.

In every such case he whose act for performance of the promise is must aver performance of the act or some thing equivalent as tender &c. otherwise his declaration is incurably ill. 1 Y.R 638. 645. Ld Ray 686. Doug 259. Str 1236. 1 East. 203. 208. 619. 7 Y.R. 125.

2d All those in which performances on both sides are to be CONCURRENT — Here neither can compel until he has performed his own part. As if it agrees to pay B. $50. for a load of wheat to be delivered on a certain day. Here A cannot recover of B. till he has (ready) paid the money or tendered it, neither can B. till he has delivered the wheat or tendered it 2 A.R. 240. 1 Saund 320 a & e 1 East 203. 619. 629. 8 Y.R. 366. 7 id 125. 4 id 701. Doug 659-65-88. 1 Salk 363.

Tender always answers the end of performance so in consequence a readiness to perform or if prevented from performing by the other party all this will be fully treated of under the head of Tender under actions on Contracts Salk 13. Str 458. Doug 658. 4 Y.R. 761. 7 id 125. 1 East 203-8.

If then the agreement is "that one shall do an act for the doing of which the other shall pay for the act, the act is a condition precedent. But notwithstanding this, if according to the terms of the agreement the money must be paid on a day certain which may or must arrive before performance, the act is not a condition precedent. As if A promises in 30 days to pay B for a year's labour here he must pay at the time tho the labour is not performed. 1 Saund 320. a & b. 2 A.R. 240. a. 1 Comb 381. 1 Ros 358. 2 Term Rep 387. 2 T.R. 572. 7 id 130. Then the payment is a condition is precedent 1 Saund 320. a. 2 A.R. 283 a 233.

But when the act is to be performed before the day of payment always, the performance is a condition precedent and must be averred in the plea for the money Salk 171. 3 id 95. Ld Raym 665. 1 Ros 358. 2 A.R. 240. 12 Mod 462.

3d. Of the transactions which the parties are entered mutual But I should prefer to call them Independent. Such is the case when the promise on each side is made in consideration of a promise on the other side, not of performance as in the first class. Then the performance by either parties is not a condition precedent. But either may sue the other without averring performance and mutual both at the same time may have an action pending.

As A covenants in consid.n of B. building a house to pay &c. B. covenants to build in consid.n of A's promise to pay. Then A. cannot, defend on B. by pleading A. has performed in f.r building the house neither can B. plead non performance by A. in an action by A. against him. Doug 665. 1 Bent. 177. 214 Hob 88. Salk. 24.

Other understandings are frequently in covenants when no

doubt neither party anticipates the legal consequences.
But Equity will not decree performance of such contracts unless the Plff avers performance or readiness to perform 7 Br Pc Chan 84. 1 Vern 388.

Another form of stipulating on which there has been some diversity of opinion. viz: A promises to pay B. $100. B transferring to him so much stock or the like. Here the promises are dependent. Salk. 112. 12 Mod 503. 4 T.R. 761. 1 H Blk. 270. 1 Vern 382. Modern Opinions are against it. 2 Blk. R. 1312, 8 T.R. 372 to 373.

The question whether promises or covenants are dependent or independent does not rely on the order in which the performance of the one or the other is mooted in the instrument Doug 665. 7 T.R 130. 6 ib. 570. 668. 1 ib 645 8 ib 373 2 N.R 240 a.
Of late the Courts of Westminster Hall have leaned against the construing of promises to be independent, 8 T.R 371. Bls 496 or 4. 96. 4 T.R. 761. 1 East 619.

When promises are independent both must be binding or neither and must also be entered into at the same time otherwise the contract is a nudum pactum, Salk 24, Hob 88. 1 Pow 360.
It would be better perhaps that both of the undertakings must be so expressed as to bind both. But such a contract with an Infant is not void or a nudum pactum for his contracts are but voidable. 1 Pow 360. Salk 24. Hob 88.

At Com Law fraud in the consideration of a specialty does.

not vitiate the contract in such a case the obligor must pay the bond, but he has a remedy for the fraud by an action on the case.

But fraud in the execution of an instrument will vitiate it however solemn, it may be for in all such cases it is not the instrument of the party. 2 Blk 304. 2 Coke 3. 9. 11 ib 27. 2 Lev 422.

The reason why the Deft. cannot allege fraud in the consideration is that he would contradict his deed and of this he is estopped, for to deny the consideration he confesses the deed. And no one after confessing his deed shall allege any thing against it, and the reason why he denies the deed by denying the consideration is that wry specialty implies a consideration. But one may deny an instrument to be his deed and this is the case where fraud is shewn in between the parties in the execution of it, for in all such cases it is not the deed of the party. But Equity will set aside fraud in the consideration 2 Bro. 145. 2 P Wms 203 3 ib 290.

In formerly an action on the case was the remedy for fraud in the consideration in simple contracts, as if a sells a Horse to B. knowing him to be unsound, & sell him for a sound horse. The old rule was that B. must pay the price he promised and have his remedy for the fraud in an action on the case. For in the action on B. the Court must give the whole price or nothing

But a rule is introduced entirely new. and it is that B. in the action against A. may and must shew the fraud in mitigation of damages, and the reason he can have no subsequent action, Baker Ev. 233. 1 Kit 39. 190-4. 8 Johns. 189. Cas. 95.

This was always a rule in a quantum valebat.

But I conceive the old rule to be the best and that a Court of Law must enforce the contract in toto or not at all.

By a rule of Law in Connect. where there is a total fraud in the consideration of a Specialty it may be shown at law, and the deft may plead non est factum. This rule was adopted many years since when great fraud by speculators in lands when it was frequent for them to give deeds of lands to which they had no title and which in fact never existed.

Interpretation of Contracts.

The object in construing contracts is to ascertain the intention of the parties and if the contract is not against law the intentions of the parties govern.

1st. It is a rule that their intentions are to be carried to their full extent provided the words of the contract will admit of it and to effect this Courts have extended the meaning of words. Thus when a trust is created to raise a certain sum out of the profits. If it is not sufficient Equity will sometimes compel a sale of the trust estate 1 Pow 372 And it is here as in the construction of Statutes, that the words used are to be taken according to their most known and usual effect. I would say ordinary signification unless there are express reasons to the contrary. 1 Pth. 55. 2 Vk 213. 1 Pow. 373. to 76.

It is a rule in Eng. that if A agrees for the purchase of 20 Cask of ale he is not to retain the casks. Yet if it was for so many casks of wine he might retain them. Here

is no original difference but it is in conformity to gen. usage. Plowd 86. 1 Roll 374.
Under this rule words of quantity are to be construed as they are understood in the place where they are used as the word "Bushel" which contains different quantities in different places. But I conceive that if there is a stipulated place of performance the case must be an exception and the standard of measure &c. must govern which is used at the place of performance. It has been thus determined as to the denomination of money as if one contracts in Engd to pay £100 in Dublin without the word "sterling" Irish currency governs in preference Prol 376. 1 do 407. 2 P Wms 88. 690.

When the language is ambiguous the intention may be inferred from various circumstances, as from the subject matter, the effect and various circumstances of the case.

1st. From the subject matter a covenant in a deed for quiet enjoyment is not broken by a tortious ouster. It only warrants against an Ouster by a higher title and from the nature of the subject nothing more than this can be intended Co Lit. 425. Co 8 212.-13. 4 T.R. 619. 3 id 58. 8 Co 91 b. Cro Eliz 272.
And "Ut res magis valeat quam pereat" Courts have so construed contracts that it may become an entire new instrument. As if a joint tenant enfeoffs his Co-Tenant, now this is impossible for the interest feoffee was seised from of the whole, but that the intention of the parties should rather stand than fall, the construes it it to be a release, and it must be so treated upon in pleading.
So if a Particular Tenant makes a grant to the tenant in

It will amount as a release. and should a creditor covenant with his debtor, that he would sue no him for his debt. as a covenant it is no debtor release to the Debtor. Hence it is held to be a release of the debt. Hob 189, Yelloa 150. Cro E 352. Salk 574. 1 T.R. 146.

2d.

The Intention may be inferred from the effect of two different and possible constructions. For if the one will give no effect to the contract, a rather give it a reasonable and beneficiary consideration a meaning. That construction which follows the ordinary meaning of the words will be adopted 3 Lev 250. 2 Blk 155. 1 Pow 382.

Courts have gone so far as to change the meaning of words. For when A gave a memorandum to B that he had rec.d of him $1000 which he promised never to pay. the Courts held it to be a promise to pay in a reasonable time 2 Blk. 155-6. 1 Pow 382. 1 Ben. 262.

And if an Annuity is granted by A to B. for services to be done by B. Here the grant is executed. yet it is considered to be conditional and that if B does not perform the services the Annuity shall cease and if it was not so held. A could have no remedy as B for non performance. Ay 14. 1 Pow 383.

3d. The intention may be inferred from the circumstances of the case. Thus if an having goods in his own right and others in right of his Ex.x A grants by his gen. of all his goods it is held not to include those held by him as Ex.x 3 Mod 278. Cro E 705. Litt Rep. 535 to 537.

But the Norfolk cases are those cases where a release or other words discharges as where one in releasing recites a particular claim, which he releases and then adds the sweeping clause, of "all claims" & here the last clause is confined to the recital 1 Ch. Cases 170-3. Mod 27. Co Lit 170. Co Lit 243 Lit Rep 235 Co Lit 119.

But when the receipt is of a particular sum without recitals any clause, "in full of all demands" have their full operation and will discharge all demands then existing as a Rec. of $100 in full of all demands. & this is the usual practice, stating something for a consideration Bellew 27. Cath 119. 1 Sta 155

In 2 Roll 409. there is an opinion that it is a discharge only of the amount stated. But this is not law

But if all other rules fail to ascertain the intention of the parties. It is a gen rule that the contract must be construed most strongly against the party who writes it & the grantee &c. 1 Co 76. Cok Lit. 170. a. 267. b. 1 Vor 395.

But when there is an ambiguity in the consideration of a penal bond and there is any hence condition as in a mortgage the rule does not apply and this is from the nature of such contracts for they are odious to the law hence in such cases they are construed favorably to the grantor, mortgagor &c. 5 Co 22. a. to 23 b. 1 Vor 397.

But there is an exception to the rule when it would affect third persons. As if a tenant in tail makes a lease for life not mentioning for whose life. It is considered for his life. But has he been paid in fee. It would have been for the life of the grantee. Then it is so held otherwise

it would require the fine instead, Co Litt 42. 1 Pow 400.
Subject to these rules the words are to be comprehended in their most comprehensive sense in which they are generally received. hence a warranty against "all men" means "all persons" (2 Roll 253. 1 Roll 402.) 1 Pow. 400
And when legal language is used it is to be understood according to its legal acceptation. Thus A devised an estate to the heirs of S.S. so long as he should pay an annual sum. This is construed to extend to all the heirs of S.S. excepting 2 Roll 253. 1 Pow. 402.
If one covenants to pay on due proof all moneys endorsed by his son, an application has the same proof means legal proof. hence the endorsement be countersigned by a Party before the covenantor is bound to pay.
Hob. 217. 1 Pow. 405
Contracts are to be construed according to the whole intent appearing from the terms of the contract, or instrument tho it should depart some particular words, clause, or intent. This is a rule and the law of decision for which reason. Cro E 43. 615. 1 Pow. 403.
If the thing stipulated for (esto delivery) and the delivery is not made as the contract requires, the value of that thing at the time of performance, is the rule of damages in most cases actually and in all cases prima facie so. Thus if at on the 1st April when wheat is worth one dollar agrees to deliver on the 1st July 50 Bushels at which time it is worth $2. If A fails to perform, the rule of damages, is the value of the wheat on the 1st July 1 Ver 217 or 19. Stra 406. 2 Burr 1110. 1 Pow 408-9.
But if in this case the action had not been brought till

August when it was worth $3 this will be the rule for B. is entitled to all he might have made, and which he has lost by delay of A. 1 Pow 469. 2 East. 211. 2 Ves. 394. But if the wheat had sunk in value after the day of delivery, the worth on the day appointed must be the value or rule of damages.

If several deeds or instruments are made at the same time between the same parties and relating to the same subject matter they are all deemed constituents part of an entire contract and must all be taken together to interpret the intention of the parties. If one A makes by way of mortgage an absolute deed (i.e. defeasance) to B. & B. executes back an absolute deed of defeasance, these two instruments must be taken together. 2 Ve. 518. Pow 440

Annulling, Discharging and repairing of contracts &c

I premise that neither party is bound until the terms of the contract are assented to by both parties, hence if A shows upon his house to B. and before B assents A offers at the same A should retract his offer. B. cannot hold him to it, attempts meeting for both seems to be bound or neither. 8 J. R. 653. 148. Mass. 334. So as to a bid at auction, the highest bidder is not bound until the bid is struck off. He may retract any time before. is and.

But an offer on one side and an acceptance on the other forms a contract and a performance or tender of performance by one will enable him to enforce performance by the other or subject him to damages

for non performance. 2 Blk 447 Hob 41. 2 Pow 63-4
and if acceptance is made of an offer and earnest
paid on it a time day in future is agreed on for per-
-formance, the contract is completed and the property
bound.
But if on an offer by one and accepted by the other
nothing further is done &c. no payment or tender
of payment, no delivery nor tender of delivery nor
earnest paid nor a day in future fixed on for the
performance but the parties adhere the cont-
-act is waived 2 Blk 447. 1 Pow 231 1 H Blk 363. 2 ib 316.

There is an class of incomplete agreements in con-
-tract and which the parties of previous consid-
-ering. When a dealer in goods in a treaty with B.
for a sale say at 10 o clock offer him offers this for
to meet and gives B till 4 o clock in the afternoon to
consider it, B calls within the time and accepts the
offer. Here A is not bound for B was not. This
was decided by Ld Kenyon 5 T R. 653.
The principle of this single contract is. That both
must be bound or neither can be hence the term
mutuus always implies to bind both, for which one is free
the other is at liberty also. A's offer in the morning
did not bind B, hence it was no contract. For
the essence of a contract is the mutual assent of both
parties, Mr Powell states this as an example of a dis-
-ming contract but it is not Law. Pow 261.

But a complete Verbal contract may be rescinded by mu-
-tual assent by parol, if done before an action accrues

As if A agrees for the purchase of an horse to be executed in some fixed day and before that time the parties mutually rescind the bargain. This is a discharge to both parties, the action had not accrued, nor did the time had arrived in which the contract was to be executed Com Dig Pleader 2 G. 13. Hutton 284 Cro Car 383. 2 Lev 144. 1 Salk. 171. 136. 1 Show 257.

But after a breach even of a sealed contract this right cannot be released by parol. no release but one under seal and discharge it 12 Coke 538.
it is said, for it is a rule of Com Law that a right of action cannot be released unless by deed.

An omission may be made or in other words an agreement may be revived in Equity by a long omission on both sides to enforce or claim under it. this is a rule independent of any Statute limitation and it is a good objection to the bill that it is a Stale one.
Pr Ch. 116. 2 Eq. Ca 207. 9 Ves 2-3. 2 P Wms 82. 1 Ves 413-14. 420 to 422. 441. 1 Atk 269.
But this presumed abandonment may be rebutted by the Plff. by showing some satisfactory reason for his long delay 1 Atk. 269. 1 Ves 422-3.
And a contract executed may be rescinded by one of the parties alone, as if there was a provision to this effect in the contract. A at 100 G. a horse for $500 with a condition that if the Jockey did not answer B's purpose that he might return them. Ho. This contract is rescinded at the election of one only of the parties. 17 Ch. 155. 7 Ch. 201. Cowp. 818. Doug 23. 2 East 145. 1 N.R. 351. 3 Esp R. 82.

Mr. Powell says that if A & B contract for property at such a price as J.S. shall name they cannot rescind the contract for they have put it in the hands of a third person. But this is not law, indeed it is an unacountable proposition. That the parties to a contract either before it is executed or a right of action accrues cannot by mutual agreement rescind it. In this case J.S. is but an arbitrator Pow 415-16.

But a right of action may be released by deed and the release may be either express or tacit, an express is always an acquittance by deed. Tacit, as by cancelling or delivering the instrument up to be cancelled 1 Pr. 416. 2 Wils 376.

So if he who is to be benefitted by performance prevents the performance. Powell says that the contract is dissolved but it should be that the party bound to performance is discharged. The other party is not discharged. If A has agreed with to build a house on B's land for $5000, and B. prevents A from entering on his land. A is discharged. & he may recover from B. the $5000 8 Co 91-2. Pow 416. to-To. 265. Cro E 374. Co Lit 206. 210 b.

That the party preventing the performance is still bound is laid down in fewer in Cok Lit 206-10.

A contract may be cancelled by a new one of a higher nature made for the same debt. This is governed by the doctrine of merger, A Judgt merges a debt on which it was had, of whatever kind, for it is the highest nature. 8 Co 45. Bep Dig 104. Bul & B 155. 1 Bur 9. 3 Burr 251.

And this rule is effective to the end of Justice for otherwise there would be two remedies for the same debt a debtor,

This rule is founded on the intention of the parties, which is merely to give a higher remedy for the same debt. But when a debt due by A to B. and to secure the same C gives his bond it is no merger of the simple contract due from A. the bond is only an indemnity 1 Pow 423. Doyle 230. b.

A contract of a given degree a cash cannot be extinguished by one of the same degree of cash and given for the same debt, and the latter is no bar to the former. (except as it will appear) But it is the same as if A purchases goods of B. to day and promises to pay him, and to morrow I promise again in this case he may recover on either, but not on both, Co Jas. 579. Co E 517.-817. Ch.B. 62. 1 Pro 424.

However the second contract when the first warrant it may be pleaded by way of award and satisfaction of the first, but a merger it can never work. For if the creditor had agreed to take the second as a satisfaction for the first it is the same as taking any other article. For the distinction of this vide 1 Selk 136. 3 East 251. Stra 426. 2 T.R. 26. 5 East. 232 or 252.
So when a contract of a lower nature is inserted in or of a higher nature merely by way of recital or to combine it and enlarge the remedy, the contract is not merged as if A. receive of another money acknowledge the receipt by deed, and also that he is to account - here an action of account will lie, against him and the deed be evidence for here the intention is plain not to turn it into a (certainty) specialty Co E. 644. 2 Bulst 256. 1 Pow 425. 218-23.

.tuts
.6. As if a Bailee acknowledges the receipt of goods by deed, this does not merge or destroy the contract of bailment but Ri. Ancts

It is a cardinal rule that a specialty cannot be annulled or discharged by parol or writing not under seal for the reason is that "a deed must be defeated by the same solemnities by which it was executed. 6 Co 44. Co. Jac. 254. Yelv. 192. 2 Nic 86. 376. 1 Saund 291. n. 1. This means that no specialty can be defeated by parol contract. But any deed may be avoided by any external act of defeasance and such acts may appear by parol.

But it is said that payment or accord and satisfaction of a bond or deed does not discharge it. This once appeared to me an unreasonable rule. But the meaning I take to be this that in pleading it should be a payment of the debt due on the bond and not of the bond itself. So that is but a rule of pleading. Co Jac 254. Yelv 192, 1 Ros 450-1. 144.

But a specialty may be discharged otherwise than by a release acquittance payment &c. Yet it may be by Operation of Law. For when the right and duty of an obligation meet in the same person it is discharged. as when the obligor is Ex.r of the obligee and e converso. for the bond is discharged at law. but in the latter it is discharged quoad actionem only. for the Exec.r the obligee may retain to its assets out of the assets. 8 Co 36. 1 Salk. 306. 2 Ros 254 to-9 Moore 62. 10 ib. 415.

The consequence in gen. is the same if the obligee or creditor marries his obligor a debtor, tho there are exceptions for which vide Sir Herbert & Nicholas 1 Ros 438-9. 444.

So, also by a subsequent act of the legislature as if A. covenants to do an act, which before the time of performance is declared to be unlawful by the legislature the covenant is destroyed Salk. 198. 8 Mod 51. 2 P Wms 218. 1 Pow 144-5.

So also a contract destroyed by the act of God except when the party covenanted against such risks for then he must abide by it. But when the contract is not of this kind such incidental accident discharges the party bound. As when the lessee covenanted with the lessor, that he would leave the timber trees growing on the land, and they were blown down, the lessee was discharged for it was not the intention of the parties that he should answer against any thing but his own acts. 10 Mod 268. 1 Cke 98. 1 Pow 446.

For one example of bailment. vide Parsons 548. 1 Pow 447.

If one covenants by a bond by a given day, to convey an estate to A. and before that day dies, he is discharged. But Eq. will compell the heirs to convey, holding the bond being sufficient evidence of the agreement.

In General the acts of third persons cannot extinguish a very a contract except in case where by the terms of the contract it is to take effect, be varied or destroyed by the act of third persons. for then the terms of the terms of the contract permit it. as If A covenants to purchase of B, at such a price as J.S. shall name. here the effect of the contract depends upon the act of J.S. the third person. 1 Pow 415-16 and the parties are bound by his decision But unless an instrument warrants such act of a stranger, no act by him can in the least effect it.

317

Executors & Administrators.

Executors and Administrators

Executors and Administrators are the representatives of deceased persons for certain purposes i.e. as to such property personal and the rights and duties which affect such property, 1 Bac. Ab. Exec. Admin. A. 1 Rw. 249. a.

An Executor is a representative appointed by the last will of the deceased and his party is to execute that will 2 Blk 503. Godolph. 82. 3

The appointment of an executor is essential to the existence of a will. Hence strictly speaking there can be no just testament an executor for a disposition of personal property in contemplation of death not appointing an Executor is called a testament, 1 Mo. 252. Godolph 82. 2 Blk. 503 Office of Ex. 3.

There may be a testament without a will and hence without an Exec. and conversely there may be a will without a testament. Cove. 3. This last

Hence an instrument naming an Ex. and containing a disposition of personal property is called a will and testament but a will disposing of real Estate is appropriately called a devise.

The mere naming an Executor without disposing of any property not only makes a will but gives the property to the Exec. subject only to the payment of the testators debts. Bac Ab. Ex. & Adm. Cok 2. Godol. 82. 6. Office of Ex. 3

An Administrator is such representative as above described appointed by law. There is proper form of revocation.

An Adm. may be appointed in three cases

1st When no Executor has ever appointed, 2d When an

executor of [illegible] [illegible] [illegible] and 2d [illegible] [illegible] executor is appointed [illegible] will [illegible] 2 [illegible] 46. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] property [illegible] of the deceased [illegible] [illegible] the [illegible] Chancery [illegible] the [illegible] [illegible] 1 P.Wms. 281. [illegible] 267

The [illegible] of Devise the [illegible] [illegible] [illegible] [illegible] [illegible] to the real estate [illegible] the [illegible] of the [illegible];

A Devisee is one entitled to [illegible] Property [illegible] the Testamentary disposition of the deceased. 2 Bl. [illegible] Gov. 271.

A Legatee is one entitled to personal property by the appointment of the deceased owner. [illegible] 2 Bl. 512.

The Power of an Executor over personal property is the [illegible] [illegible] except so far as he [illegible] [illegible] entitled to it, but over Real Estate [illegible] Adm'r [illegible] such, has no power [illegible] for real estate [illegible] [illegible] devisable [illegible] 3. 4. [illegible] [illegible] [illegible] Executor may have the [illegible] [illegible] [illegible] appointment of the Testator. 1 Atk. 420. [illegible] 294. [illegible] 204. vide [illegible] Devise.

Nor an Administrator from the [illegible] [illegible] appointment [illegible] as such have any power over Real Estate. A Devisee [illegible] [illegible] [illegible] the [illegible] [illegible] a title to all the [illegible] [illegible] the Executor.

But a devisee [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] without the intervention [illegible] [illegible] [illegible]. [illegible] Ex. 27. t. 29. Plow. 525

The [illegible] [illegible] [illegible] [illegible] [illegible]

all his debts and by the C. Law. Real property is only liable for debts due by specialty a debt of record. 2 Bl. Com. 430. Bac. Abr. Ex. H. A. 4.

The Court has ever the real estate liable for real debts. Exec.rs & Adm.rs are bound by the personal contracts of the dec.d tho' not named to pay as they have assets, except from nature of the contract it must be performed by the Ex.tor & hereditaments since Federal Contracts do not bind an Ex.r or Adm.r. Effect of Feds. 114. Ga. 165. Ga. Cas. 184. Cas. Ed. 533.

On the other hand, the heir is not bound even by the special Contracts of his ancestors, unless he is named in them or by the ancient Lawes as the property, than goods and Chattels, and the policy of Law was liable for tort, an exception in the Contracts, the Testator and the heir inheritable only the real estate. 2 Bl. Com. 418, Hyde 180. Yel. Cas. 2 Roll. 472. 1 Bac. Abr. Ex. H. 4. Exception of Tenure in ancestor requires an heir at Law, in order, it is necessary to charge the heir the representative in the Contract but this need not be proved if an Exec.r. 2 Saund. 136. Roll. Ab. 920. n. an even where the obligation of the ancestor descends to the real Property in the hands of the heir: the heir is only a person subject to execution. 1 Ch. 240. 113. Moos. 208. Sto. 12. a. Cro. Ac. 40. 1 Bl. Ab. Ex. H. Execution.

Executors & Adm.rs who have assets in their hands of their testators are charged in the double character of the debtor & the debtor or they are liable as in effect of property which they have in their right of another. If they be charged as heir of assets, the remedy is pursued by a writ called the Ext. of Scire Fac. 1 & 17 Car. 2. Sto. 14. a. 2 Ch. Ca. 34.

On the other hand, an executor not being liable at law, when he is sued is charged with both the detinet and debet for the assets in respect of which the debt accrues, he holds in his own right. But if he is charged with one only the proper is only liable, under the same rule. See Ch. 472. 1 P. Wms. 5 Co. 30. a. 1 Lev. 130.

It is laid down in some of the Books that a testator cannot bind his Ex.r but he is also bound. The ground of this rule was that the Ex.r liability is only derivative. See Ch. 232. Bac. Ab. Exr. D. 6.

This rule tho, not ammended in our Books, cannot be law. It is agreed that if a man agrees to give his wife a certain sum after his death, Executor is bound. 2 Bur. 1353. Esp. Dig. 199. 8 T.R. 483.

Who may be Executors.

A person who can make a Will of personal property, and some others who cannot make wills, may be Executors. Persons of almost every description may be Executors. Office of Ex. ch. 23. Bac. Ab. Ex. A. 1. Ow. 155. Godolph. 163. A married woman, an infant &c. may be an Ex. Office of Ex. 204. 207.

By the Common Law any Infant Executor at the age of 17 is bound by his acts done as Exec.r provided it is done according to his Office & duty, but not otherwise, it must be rightfully done and not to his own prejudice & that is all one who have a right to the Abst. 5 Co. 27. Bac. Ab. Exec. & A. 7. Office of Ex. 215. 216. 309. Cowlin 671. Co. Lit. 490. Toller 356. 357. 215. 216.

The Female can at no rate be not entitled to action, [illegible] until the age of 21 years, [illegible] any act which would [illegible] a demand [illegible]

[illegible] 1 Vin 328

By a late Statute however, no one can act until he is of full age

A Married woman may be an executrix, [illegible] the Law the wife by [illegible] without the consent of the husband [illegible] 202, 241 & 31. 241. 91. Godol. 13.

But [illegible] be an Executrix [illegible] her husband [illegible] 208.

On the other hand, a feme covert cannot be compelled to act as Ex^x by the grant, her husband without her own consent. If she is named Ex^x, [illegible] administer, the is bound by his acts, though [illegible] is void.

If a married woman, who is named as Ex^rix administers without the consent of her husband, the cannot plead, in to an action brought against her, for the act will be her act, [illegible] the [illegible] cannot plead that the never was Executrix Bac Ex^r A. 5. Godol. 11.

If a foreign [illegible] a corporation aggregate could not be an Exec^r because it was not [illegible] for such purposes, but because it cannot take the oath [illegible] Exec^r 2 Ld Ray 363. 1 Ex. 1 Fin 25. Bac. Abr. Ex^r A. 2

But the rule seems to be now settled that a corporation may act and may be an Ex^r and may not be [illegible] by a person [illegible] by the corporation

who becomes administrator cum testamento annexo, and takes the oath like any other person. Toller 30. 31. 1 Roll 915.

A single or sole corporation may be an Executor. Bac Abr. Exec. v. A. 2. 1 Bac 28. Godolph 85.

By the Civil Law no one is disqualified from being an Exr. by reason of any crime against the civil or temporal law. Heretics outlaws and persons attainted may be Exors. tho neither can make a will. 1 Bac 128. Bac Abr Exr. A. 3. 1 Bac 184

Most persons Excommunicated cannot be Exrs. in Eng. Bac Abr. Exr. v. A. 3. 1 Bac 134. Godo. 85.

An alien friend may be an Executor or administrator. He may have the administration of leases or transfer them in real Estate for he holds in right of another. But he can sue for a debt belonging to the deceased. Cro. Car 8. G. Off. of Ex. 17. 22

Whether an alien enemy can be an Exor. or administrator is a question as yet is not settled. Co Eliz 142. 1 Salk 46. 3 Ellm 483. 431. Bac Abr. 57.

The better Opinion is that he cannot act as Exr. or be an Exr. unless he has a Governmental license, or a safe conduct. 1 Bac 129. B. Salk 46. 2 Ld Ray 282. Toller 32.

Idiots Lunatics and intermeddling cannot be Exrs. God. 86. Bac Abr. Exr. H. A. 5.

And if an Exor. becomes lunatic or mental administration must be given to another. Bac Abr. Exr. A. 5 Salk 36.

The Orphans Court cannot revoke the probate of a will to any one because such person is incompetent, or

authority is derived from the Testator. 2 Ray. 861. Salk 36. 299. Car. 457. Willes 32.
Nor can that Court demand security of the Ex.r on proving the will. The ex.r authority is completed by the appointment of the Testator, & Ch. Admin.rs or tutors Ex.rs are required to give security Bac Abr. Ex.r — A. 6 Shows. 293. Car 457.
A Ch. of Equity however considering Exec.rs as trustees will compell them like any other trustees to give security when the state of the case requires it Car. 458 2 Ver 249. Bac Abr. Exr. & A. 6.
On a suggestion of insolvency the Ch. of Eq.y will also may order the debtor not to pay over the debt to the executor pendente lite, relative to insolvency Bac Abr. Ex.r A. 6.

Who may be Administrators

All persons who are not legally disqualified may be administrators, but no one can act as admin.r until of full age. for every admin.r is required to give security for the faithful discharge of his duty as trus. for admin.rs are appointed by the proper Court and not by the person whom he represents — Salk 39. Car 446. 447. 2 Ray. 338. 5 Mod 345.
It is said however that the right to administer may devolve on an Infant who is the next of kin but it cannot convince how one who cannot act as administrator can be an admin.r
A Feme Covert may be an admin.x with her husband consent for his rights, may be effected by her acts. But it is said if he is abroad a stranger is competent to act as admin.r the

A feme covert without her husband's consent, but the owner accepts the trust without her husband's consent. If he is in a situation to give consent. Dig. Ordin. 2. Salk 21. Yelv. 91. 2 Bl. Rep. 801.

When he accepts the accepts the trust with her husband's consent, he must give the administration upon in court.

But when a feme covert is appointed admr. the husband is bound by her acts only during coverture. But if he be the effects after her death, the creditor may pursue them in equity with his hands but this cannot be done at Lad. Prec. 309. 2 ib. 61. 118.

The present rules of succession to intestate personal property were unknown to the ancient E. Law. The ecclesiastical court has been said to have belonged originally to the spiritual courts, the others have given such property to the King as Parens Patriae. The latter opinion is Stunks Correct. 1 Lev. 158. Salk 37. Contra 9 Co. 38. 2. Bl. 494. Bac. Abr. Ex. & E. 1. 1 Lev. 86. It a late period it seems that the crown invested the prelate with this authority Perk. 486. 1 Eq. Ca. 206. 2 Bl. 494. But this delegation was an unusual for the right has in some cases been granted to Lords of manors as a franchise 9 Co 37. 2 Bl. 494. But if the ordinary disposed of them in any other way than in pious uses he was deemed guilty of a breach of confidence, 4 Bla 494. The power of the ordinary ceased after it the Prelate's wills. Thus the jurisdiction of Wills became an estate in the prerogative courts in each.

When a person died at E. Law what was called a reasonable part of the life was awarded to the children of an intest.

2 Blk 495 These two parts amounted to two thirds of the whole intestate property. By the Com. Law the Ordinary was not bound to pay even the debts: the intestate's goods were always bound to pay the debts. at C. Law. on the other hand no one could bequeath all his personal property if he left a wife or children. The widow and Children were in all events entitled to their reasonable parts. Hitr. 122. 2 Blk. 491 -2-5.

The first check given to the power of the Ordinary was by Stat. Westm. 2. 13 Edw. 1. Ch. 19. By this Stat. the Ordinary was compelled to pay the debts of the intestate so far as the assets would allow. 5 Mod 247. Comb. 378. 1 Wms 4. 2 Blk 495 Ray 497. But this Stat. left the surplus at the disposal of the Ordinary. The abuse of this power occasioned another interposition of authority. By Stat 13. 31 Edw 3 Ch 11. it was enacted that in case the intestate died the Ordinary should see to the next and most lawful friends to administer the estate. This Stat. is the origin of Adm. 2 Blk. 496. Love 2. Ray 498. But other Ex. & Ad. 4. — This Stat. enables Adm. to sue for debts due to the deceased as Exr. could do at Com. Law, and it subjected the admin. to the creditors of the intestate just as an Ex. was subjected at C. Law. This Stat. is then the original of all actions by & against Adm. Bac. Abr. Ex. & Ad. F. 2 Blk. 496

But this Stat. did not oblige the Adm. to distribute the surplus after payment of debts. Ford. 253. 2 P. Wms. 447. 1 Lev. 233 2 Blk. 515

An Adm. however appointed in one of these States cannot sue in another, unless he prays out letters of Adm. de novo in the other State. 2 Ves 35-6. 4 Dev 87. 46. 2 Hen Blk 406.

1 Ven. 1 Blk 154. 1 Ff. 684. Imbler 25 – and there has been an opinion that the same rule holds with Executors. 4 Day 96. Comb. & thinks however the rule as to an Ex.r incorrect. An admr authority cannot extend beyond the jurisdiction of the Court from which the authority is derived, but an Exr requires all his authority from the testator and none from the Court. By Stat. Westm. 31. Edw 3rd ch. 11 – the ordinary is bound to grant administration to the next and most lawful friend of the deceased: In construction thereof the next and most lawful friend is the next of kin, who is under no disability – 9 Co 39. B. 2 Blk 496.

A husband is entitled to administration on the estate of his wife 4 Co 51. B. 2 Blk 504. Foller 83. 1 P. Wms 144. Ecc. Ff. Stat 1 Mic.

When there are persons of the same degree to the estate the better opinion seems to be, that the ordinary may select one to administer, Ray 498. Foller 83.

The Stat Hen. 8th 21st c. 5. permits the ordinary to grant administration to the widow or next of kin of the intestate at his will, and when two or more persons are of the same degree of kindred, the ordinary has his election to accept whichever he pleases Salk 36-8. Strra. 552. Ray 93. 1 Ver 315. 2 Blk 496. 504.

Upon these two statutes the gen. law of Administration was founded and now stands. But even under this Stat the admr was not obliged to dispose of the surplus in distribution –

By the Stat of distributions 22 23. Car 2. Ann. however with the exception of husbands administering on their wives estates

are bound to distribute the surplus God. 253. 254. 1 Leo 233. 2 P. Wms 447. 2 Bulk. 515. 8 Co 135.
The Stat. says nothing of husband. But the Stat of 29. Car 2. expl anatory of the above Statutes expressly declares that husband shall not be bound to distribute the surplus —
But if a wife being Ex.ix of another person. his administration of the effects does not belong to the husband but to the next of kin of her Testator 3 Salk. 21. Love 3.

Administration when granted to two or more persons may in all cases and is generally joint. But it may be several. thus several administrations may be granted of several distinct parts of the Intestates estate. when several, they never survive for the several authorities are distinct and in no way connected.
But when admin.n is granted to two of one entire thing the Administration is joint. so if the whole estate of the intestate is granted to two or more. when the admin.n is joint it survives to the survivor
Love 4. 1 Roll 908. 1 Show. 351. Salk 36.
In order to ascertain who is next of kin. and who is the before entitled to administration the degrees of kin are computed according to the civil Law. hence it does not ascend among Claimants except in defect of descendants a children. The Order of Claimants is. 1st Parents, 1st Children. 2d Parents. i.e. the Father if there is one & if there is no Father, the mother. 3d Brothers. 4th Grandfathers. 5. Uncles, or Nephews. & 6th Cousins —
The females are entitled in the same degree as males except in the case of a mother. See. Ch. 327. 1 P. Wms 41. 1 Ch. 455. 3 ib 762. 2 Bulk 504 5. Foster 88. & 90.

In this scale of degrees the wife is not mentioned: if a man dying intestate leaves a widow, she may be appointed instead of her children or of the Parents and so on of all the classes, i.e. she has an equal claim in the alternative with all and each of the classes. In computing these degrees propinquity rather than quantity of blood is regarded, hence a brother of the half blood is equally entitled with a brother of full blood and the relations on the side of the mother have an equal claim with those on the side of the father. 1 Ven. 316. 23. 425 Yelv. 91. 1 Salk. 38. 1 Ven. 437. 2 Blk 505.

If none of the above persons will accept the trust a creditor may by custom be appointed Administrator.

And in defect of a creditor also the proper Judge may appoint any one whom he may approve of Salk. 38. 2 Blk 505 Plow. 278. Lov 5.

If an Ex.r refuses to accept the trust Administration must be appointed cum testamento annexo this is indeed required by Stat 31 Hen 8th 2 Blk. 505. 1 Ven. 219. Bac Abr. Ex.s E. 13.4. But in this case the Ordinary is not bound in his selection of an Adm.r by the Stats of Edw. 3. & Hen. 8th where Stats relates to cases of persons dying without a will. Stra 156. is not. - God 230.

When an Adminis.r succeeds intestate, if an Infant Ex.r is to be appointed the Ordinary is not bound in his selection by the Stats and for the same reason. Hob. 251. Bac Abr. Ex.s H. 3. Ven. 31. 8 Mod 244.

Of the transmission of the trust

If the sole Admin.r dies leaving any part of the

estate unadministered. his Executors are not administrators to the original intestate nor in any way his representatives. In such case an Adm.r de bonis non must be appointed. Indeed no administrator can transmit his trust to another which is reposed in him. the Trust-a authority is personal and on the death of the Adm.r it results to the ordinary from whence it was derived, Roll 907. Godb. 230. 2 Bik. 506.

An in such a case the Adm.r of the original Administ.r is not a representative of the original intestate. 2 Bik 506. and in such a case the Administ.r of the original Adm.r is not the representative of the original intestate. 2 Bik 506.

But an Ex.r may transmit his trust to another

Hence if A leaves an Executor who has proved the will of A and dies, having appointed an Executor of his own. this last is Ex.r to A and the rule continues, there as in-finite series of persons appointed Executors as in the above case. This rule is grounded on an Ex.l authority being derived from the Testator 1 Roll 907. Toller 243. Office of Ex.r 259. Com. Dig. Adm.r. F. 12, v. 312.

But the original Exec.r cannot thus transmit his trust unless he has proved the will of the Testator. for otherwise there is no legal proof of his being Exec.r in. Ewst. Salk 305. But Ath. Ex.l Ec. B. 2.

The Ex.r transmits not by appointing an Ex.r to his Testator but to himself.

But if one leaves two Ex.s and one dies leaving an Executor of his own. this last is not Ex.r to the testator of the person whom he represents. for one of the original Testator is living and the whole trust survives to him. But on the death of this surviving Ex.r a person he leaves as his own

Ex.r is the Ex.r of the original Testator, Salk 311. 2 Blk. 506. Yabbot. 127.
On the other hand the Adm.r of a st. Ex.r or the Ex.r of d. Adm.r is not the representative of A. for a Trust can neither be transmitted to or from an Admin.r Ford 230. 5 Co 9. B. 2 Blk 506.
If then an Adm.r dies leaving only an Adm.r an Adm.r cum testamento annexo must be appointed to the Original Testator. 1 Roll 907. Bac Abr. Ex.rs & C. B. 2.
The result then is that whenever the regular course of Trusts from Ex.r to Ex.r is interrupted by any one Adm.r and goods remain to be administered, an Adm.r de bonis non must be appointed 2 Blk 506. 1 Roll 908.

Of the Probate of Wills

The ordinary may either ex officio or at the instance of any one interested cite the Ex.r to appear and prove the Will. Ford. 60. Bac Abr. Ex.rs & C. 8.
If it is uncertain whether a man who has made a will is alive or not the facts are to be judged of by the Court having the probate of wills. If a man who has gone abroad is by common fame dead the Court it is said must grant Probate, but if he proves to be alive the Probate is void ab initio. Ford 61-2. Bac Abr. Ex.rs C. 8. 3 Ch R. 129-30.
There are two modes of proving wills by the English Practice viz.
1st. Probate in Common form & 2d. A Probate in form of law.
The will is proved in common form when the Ex.r presents the will without citing the parties interested and merely deposes himself.

And it is proved in form of Law when the Parties interested are cited, and witnesses examined before Probate granted. Dod. 62. Bac Abr. Ex.ors E. 8.

The Probate in Common form has no effect whatever when there is any contest relative to the will Dod. 62. in. out.

But a Probate in form of Law is conclusive

An Ex.r may be forced to appear & prove the will but he cannot be compelled to accept the trust - nor can he assign & transfer it Toller 41. Bac Abr. Ex.rs & E. 9.

And he cannot refuse the trust by any act not of record. thus he cannot decline by parol refusal but only by some act recorded in the Court of Probate. Off. of Ex.r 37. Bac. Abr. Ex.rs & E. 9. Co. Eliz. 42.

If there is but one Ex.r named and he renounces the trust an Adm.r cum testamento annexo must be appointed and after such grant the Ex.r cannot resume the trust. 1 Roll 907. Bac. Abr. Ex.rs E. 9.

But if one of two or more Ex.rs renounces - the will is proved by the other, the first may resume the trust at any time even after the death of his Co. Ex.r. for his renunciation does not destroy the original trust 1 Salk. 311. 3 P Wms 251 7 Mod 34. 5 Co. 28. 9 id 27.

The substance of the reason of this rule is this. that as the will has been proved by one of the Ex.rs the ordinary has no authority to accept the renunciation of the other during the life of him who has proved the will. a renunciation can only be accepted by the ordinary when there is but one Ex.r appointed & where but one of two or more appointed are living 5 Co 28. a. 9 id 37. a. Litt. sec. 512. 1 Fur 392. A. & B.

But an Ex.r can never renounce after he has once administered

acts as executor, or takes any other, administering his Ass. an express time after it and destroys his right of renunciation. Tod 141. 2 Ellen 14. 1 Ver 383. ie. 313. Ayl Ex: B. 2 Lee, 12.

Whatever an Exr. appointed does respecting the testator which shews that he intends to accept amounts to an act of Administration and is an acceptance of the trust — And any act which shall make a stranger liable in his own wrong would if done by the Exr. amount to an acceptance These two rules however amount to the same thing. 1 Bac Abr. Ext. to C. 10. Roll 917.

If an executor appointed takes the goods and converts them to his own use. it is an acceptance. is aut. 1 Off of Ex. 39.

And if he takes the goods of a stranger and administers on them claiming them to be goods of the testator it is an acceptance Bac Abr C. 10. 1 Roll 917.

Indeed any act done by an Ex. which is proper to be done by an Exr. is an acceptance, is aut.

But tho, an Exr. having administered cannot renounce yet the Court may accept his renunciation for his act of administration binds himself alone Off of Ex. 40. 41. Bac Abr Ex: C. 9.

If an Exr. appears however and takes the oath usually taken he cannot afterwards renounce in any manner for his acceptance is a matter of record and after his taking the oath the ordinary cannot repeal granting administration Ld. Raym 363. 1 Ver 335.

The Oath is that the Exr. appointed will justly execute his trust.

Of Granting Administration

Administration cannot be granted by parol. tho some have supposed it could be, it must be granted in writing, the sealing is not indispensable God 230. Com Dig. Ex. Admin. B. 7. Toller 119.

The rule laid down ante that administration can be granted only in three cases, relates only to original administration and not to the trust when transmitted

Administration must be granted in the following cases—

1st. When one dies Testate 9 Co. 39.

When the grant is original, the Admr. has what is called a general authority and acts for himself, as administrator and not in the right of a superior representative.

The Ordinary may take bonds in all cases of administration grants. Stra. 1137.

Administration may be granted to one or more persons, When granted jointly to two, the office on the death of one survives to the other, so such persons are rather officers than mere agents. 2 Ver 514. 1 Bac. Abr. Ex & A. 1 Atk 462

Administration when granted to two or more may be joint and several

If a person is made Exr. or Admin.r. without limitation he cannot renounce as to part but accept as to the rest of the estate Ecc. 163. Toller 42. 1 Atk 297.

When a sole Ex.r or admin.r is absent from the realm and therefore incapable of executing the trust another may be appointed to act during his absence, this was formerly doubted, 4 Mod 14. 15. Bac. Abr. Ex & A. Ea. Rep 1671. 3 Lev. 25 Salk 304

A temporary administration may be granted while the general Admr. is in prison but in both of these cases the temporary administration ceases when the absence or imprisonment ends. Bac. Abr. Ex. & Ad. 1 Roll 908.

A temporary administration may be granted "pendente lite, while the probate of the will is under consideration, this too ceases as soon as the question of Probate is decided Stra 91. 2 Ld. Raym 576. Bermudez 423. Bac. Abr. Ex. & Ad. Contra Cro. 135.

And there the same rule holds where there is litigation relative to the right of administration Com 153.

When temporary administrators are liable to be sued and may sue while authority exists Stra 91. Ld. Raym 10, 1, Yelv 44. 1 Co 67. 2 Ld Raym 576.

If an Ex. appointed dies before Probate of the will granted an immediate administration cum testamento annexo, must be granted, and if one makes a testament without appointing an Ex. an admr. cum testamento must be appointed Com. Dig. Admr. B.1. 2 Blk. 503-4-5, Yelv 48-9, and if a person named as Ex. dies before the Testator an admr. cum testamento annexo must be appointed Stiles 147. Yelv 48-9,

and if a person named as Ex. becomes incompetent, there must be an admr. cum testamento annexo Salk. 36. 2 Ld Raym 582.

If an admr. dies having part of the goods administered an admr. de bonis non must be appointed. 1 Roll. 907. 2 Blk 506. Bac. Abr. B. 3.

And if an Ex. de bonis non dies intestate after proving the will an admr. de bonis non cum testamento annexo must be appointed Salk. 304. 5. Bac. Abr. Ex. & Ad.

An admr. de bonis non is entitled to all the personal

property of the deceased which specifically remains unadministered when he is appointed, is not,
so he may recover debts uncollected is not. But if the original representative had taken a security due to the testator to himself. the property is so altered that it vests in the representative of the original representative, and not in the Admin.r de bonis non. 1 Ven 473. 1 Roll 380. 2 Ca 362. Bac Ab Ex.r B. 2. And by the ancient rule of Law If the original Exec.r or admin.r had brot and recovered Judg.t without taking Execution, the Admin.r de bonis non. could not procure execution on the judg.t for there was no priority at C.L. between the original representative and the Admin.r de bonis non. But now by Stat 1 Car. 2d. he may pray out a Sci-fa - and have execution on such Judgment, provided the judgement was unrevoked 5 Mod 290. Salk 322-3. Hob 33. 83. Sated 140. 2d Ray 1072.
If an Executor is under the age of 17. or a person is entitled to administer who is an Infant. an Admin.r durante minoritate must be appointed. as to the executor. vide. 5 Co 29. B. Love 193-3 Mod 24. Off of Ex.r 307. as to Admin.r vide 5 Mod 395. Salk 39. Com R. 159 or Com R. 159. Bac Ab. Ex. B. 1
But if the Infant is Co. exec.r with an adult there is no need of appointing an Admin.r de bonis non durante minoritate. for the adult has the power of executing the will Bac Ab. E. B. 1. 2 Sc. 239. 240.
So at C.L. if of two infant Ex.rs one is 17. the rule is the same - for the one may act. this does not now hold now by Eq. Stat. Love 195
An Admin.r durante minoritate is a substitute for an Ex.r or Admin.r who is incapable to act. and is strictly in

the nature of a bailiff to the original representative he is in gen. however the power of the original representative 5 Co 29. a. Cro E. 718. 3 Co 8. Leon 103.

The Original Representative acts for the benefit of those who are entitled to the assets. but an Admr. durante minoritate is either a Representr. of the original representr. for whose benefit he acts.

But an Admr. durante minoritate cannot give his assent for the payment of a legacy unless there are assets for the payment of debts, 5 Co 29 B. Bac Abr Ex. B. 1. But he may sue and be sued in Ecct. and Cro E. 719. 6 Co. 67. B. Still such an Admr. can do nothing to the prejudice of the Ext. for whom he acts. hence he can not sell the goods unless for the payment of debts or when they are perishable. 5 Co 29. B. Bac Abr. B. 1. Cro Elizabeth 719

Of the Repeal of Administration

it was formerly supposed that the court or Judge could not repeal an administration granted by the 45. Eliz 93 1 Rol. 683

But this doctrine is now exploded and letters of administration may be repealed by the Judge who granted them when sufficient cause exists.

When administration has been unduly obtained it may be repealed by the Judge who granted it 1 Rol 907 Tow. 1847 Latch 67.

In case of actual interfering if Admon. has been granted to a person not entitled to it it must be repealed

on the application of the person entitled to it. 3 Salk. 22, 1 Sid. 409.

And if it has been granted to a stranger when there are kindred entitled to it, it must be repealed. Salk. 38. 1 Ven. 28. 2 Lev. 56. When an Adminn. has been obtained by false suggestions, or fraud it may be repealed by the Ordy. who granted it. 1 Lev 293. 3 Ev. 2 Feb. 63. 72.

When it has been obtained in any irregular manner it may be repealed. 1 Lev. 305. 2 Feb. 64. Cro Car 4.

As a general rule, whenever letters of Adminn. have been improperly obtained they may be repealed by the Ordinary. and Letters of Adminn. duly obtained may be repealed in consequence of matter ex post facto, as if an Adminr. should become insane 1 Lev 158. 1 Feb. 846. 1 Sid 373

If the person legally entitled to Adminn. is incapable of acting as Adminr. at the Intestates death and letters are granted to another they may be repealed as soon as the first person becomes competent to administer. 1 Sid 372-3. Lowe 18, 19.

The consequences of a repeal of letters of Administration is a very important inquiry.

It is a general rule, that where the only objection to a grant of Letters is that was to a wrong person the grant is only voidable, 3d Rem 684.

If Adminn. is regularly granted to a wrong person and is afterwards repealed on citation, all the intermediate acts of the Adminr. are good by a lawful act is meant one that would be valid if done by a rightful Adminr. 6 Co 18 B. Salk. 38. Bro Chr 460.)

And in this case if the first Adminr. is a creditor of the Intestate and returns goods to the amt. of the debt, as a lawful

Admr. may do. the return is good, even after the repeal
Com Rep. 46. Salk 35. 684.
The effect of a repeal on citation is the same in all cases
when the first grant of the administration was merely
voidable Toller 129. 130. Comyns Digt Admr. 10.1.
A citation as now used is a summons by the same judge
who granted the original letters.
But in all these cases if the grant is repealed on an appeal
to a higher jurisdiction all the intermediate acts of the
Admrs are void 5 Co R. B. Bac Abr in Wills 4 C, 3 Rep 206-7
3 Term R. 129-30. This distinction has been complained
of by some persons in this country.
The reason is, An appeal upon citation is only a revocation
of the letters of Admr. but does not reach the original sentence.
it puts an end to the Admrs authority but does not
avoid the sentence. But a repeal of a mere sentence
on an appeal destroys the foundation of the trust when
a repeal on citation merely destroys the trust itself. this
I think is a sound and correct principle. when the admrs
first granted is void ab initio. all acts done under it must
be void because they may be set aside Salk 38.
If Administration is granted by incompetent authority, all
acts done under it is void, Salk 38. But it has been decided
that if one dies intestate & a will is found and proved as the
will of the intestate deceased, and the probate is afterwards
repealed on citation all intermediate bona fide acts are good
3 T Rep 125. Toller 77.
The Principle is that the acts are done under the authority of
a court of competent jurisdiction. But if probate is obtained
of the will of a living person supposed to be dead all acts
under the probate are void for in such a case the court op-

Probate has no jurisdiction over the will Toller 77. 3 T Rep 130.
The Rule that "on a repeal upon citation all lawful acts are good" holds only in cases of intestacy and not in cases where there is a legal will. If where a will is left Admon. is granted and repealed on citation all intermediate acts are void, for the Ex. had an interest of which the Ordinary could not deprive him. The better reason is that when the will is left the Ordinary has no authority to grant admon. 1 Show. 411. 2 Lev. 183 1 Vent. 303. Plow 277. Salk 27. 2d Ray 1210. Contra 3 T R 130. -1-
When an original administration is repealed on citation the authority of the Admr. ceases on the repeal and he is liable for all the assets then in his hands and for all previous unlawful acts, to the rightful Admr. 6 Co 18 B. Salk 38. 2 Saund. 137.
When an Admon. is repealed on an appeal all the intermediate acts are void. thus if the Admr. has paid any thing which the rightful Admr. ought to pay or have paid the act is void and he is liable to an action. But he may give it in evidence "that he has paid lawful debts" in mitigation of damages Plow. 277. 1 Ven 439. Stile 338.
[illegible] admon. is void & must cease on appeal. Payment of a debt when voluntary to the original Admr. does not release the debtor, even tho. a release be given Roll 919. 1 Ven 349. 2 Bulls. however & perhaps correctly think this rule is hard upon the debtor. 3 T Rep 130. -1-
It is agreed however that if the debtor is compelled to pay the debt to the wrongful Admr. on a judgt. and Execution against him, he cannot be compelled to pay a second time. Exc. Mr. Ex. 9 C.B. for he who has been once compelled to pay a debt by law cannot again be compelled to pay. Ow. 160.
How far the Probate of a will & granting administration in consequence when unrepealed how far conclusive in other courts will

will be explained under the Title of Evidence. Such a probate or grant however while unimpeached is conclusive in all other Courts of Justice Stra 641 2, 481. Salk 11. 1 Ppwms 388. 548. Toller 46-7.

Of the Power of an Executor before Probate of the Will.

As an Ex: derives all his authority from the will and not from the probate, the interest in the testators effects is fully vested in the Ex: upon his appointment. It rest on him immediately on the Testators death. Probate is merely necessary evidence of the Ex: title of interest. Off of Ex: 33. 1 Hus 292. Bac. Ab Ex: E. 12. 1 Atk 460; Toller 45-6, 75.

Hence in an action by an Ex: as such, a plea that he has not proved the will is bad. but a plea that he is not Ex: is good and upon this plea the Ex: must produce the will & probate in evidence Salk. v. Hunt 31.

1 As the Ex: derives all his authority from the will he may perform almost any act before probate and it will be valid. Gra 144. Bac Ab Ex: E. 14. Com Dig Admin. B. 9. 1 Atk. 48. Salk 247.

2 But an Admin: can do no valid act until administration granted. 2 Atk 507. Bac Ab E 14. Salk 303 & 388.

3 By valid acts are here meant bonafide acts affecting the assets or rights of the Claimant.

The Ex: then may enter and take possession of the assets & effects of the testator & he hereby becomes a right to enter the house of the heir at law to take the effects and securities provided he does it peaceably Gra 144. Off of Ex 33 2 Hus 277.

He may before probate assent to a pay a legacy or debt. Off of Ex 34. to 49 Yerk 3. 481 Toller 46. Gra 144. 1 Hus 292 Hutton 31.

But if one entitled to Admin.n should receive debts and grant releases before Letters granted, he may after administration recover them again. he is liable tho, to refund what he originally received. 5 Co 28. B.
The Ex.r may sell & give away the effects before Probate, but he is still liable to account for them Off of Ex 34. Bac Abr. Ex. E 14
It is said indeed that a person appointed Ex. is before Probate a complete executor to all purposes except that of bringing actions which he cannot do untill Probate 5 Co 28. a. 9 do 39. a. 10 & 52. a. Off of Ex 51. Salk 301
But the last branch is incorrect: The true rule is, the Ex.r can not maintain an action nor file his declarat.n untill probate for he must produce his Probate to prove his right of action and he must plead with probate. i.e. declare that he brings the Letters into Court Com Dig Adm.r B. Off of Ex 36. 9 Co 38.
But this proposition that he cannot declare before probate applies only to those cases where he sues as Ex.r eo nomine, for there are many actions which an Ex.r may bring in his own individual capacity. The cases then wherein he cannot declare before probate are 2. viz,
— 1st In actions of debt or any other action on the Testators contracts. and
2d In such actions for torts as accrued during the Testators life time —
In these cases the right of action is derived from the testator Com Dig Plead 614. Lolle 47. Off of Ex. 36.
He may however before Probate bring, declare on and maintain Trover, Ass.pas. or any other proper action for an injury to the good done after the death of the Testator

or the goods were either actually or constructively with possession - 6 Mod 92. 2 B. 268. Yelv. 33. 1 Ld 12 85. Salk 302. Off of Ex. 35. 50.

But in such cases he may sue in his own individual capacity or as Ex.r But if he sue as Ex.r he cannot declare without probate. 6 Mod 92. id 62-3. 2 Keb. 668.

And it is laid down as a rule that before Probate he may maintain Trespass or Trover for assets converted after the Testators death - tho they never come into his actual possession for being a title to them is here a constructive possession Toller 48. Law 154

This Rule I think is erroneous. The constructive possession is merely a consequence of his legal title to the property but this title cannot arise without probate of the will. An Ex.r may before Probate maintain actions in his own individual capacity on contracts made with himself relative to the effects after the Testators death Off of Ex 36-7. 7 R. 358. 4 id 277. 2 id 447. Ld Ray 436. 1 Ven 109. Off of Ex 41. 53.

With respect then to actions on the Testators contracts the Ex.r may before bring an action, but he cannot proceed in it, until then filing his declaration. to do this he must have probate in all cases the probate relates to the death of the Testator and removes all incumbrances 3 Lev 58. Ray 481. Comb. 371. Salk 302. - 3 - 7 - 9 Co 38. 1 T R 480. 4 id 260. Toller 75.

Of Co-Executors

When there are two or more Ex.rs representing one testator. they are in law deemed one party and as one person hence their interest is not merely joint but individual by their own acts Cro 134. Toller 357-243. Off of Ex 254. Com Dig Action. G.

Their joint capacity then is more absolute than that of joint

Tenants hence the act of one in gen. is the act of all so the possession of one is for most purposes the possession of all Co 134 Offo of Ex 45. Co Eliz 347 Com. Dig tit Adm B. 12. Toller 359.

Hence if one of two Exs grant all his interest in the effects or any part of them the whole interest passes, so if one releases his part of a debt the whole is released Cod. 134 Bac abr Ex & D. 1.

On a similar principle a grant of the interest of one Co-Ex to the other is void for in law each is possessed of the whole Cod 134. Bac abr Ex D 1

One Ex cannot have an action of account against the other for a part of the profits the estate. But it is said one Ex may compel the other to account with him in Eq. 1 Roll 117-8. 1 Lid 33. Cod 135. Bac abr. Ex. D 2.

But Co-Exs may plead different pleas for otherwise an unprincipled Executor might ruin his Executor-Co. Hence a Power of Atty given by one to confess judgt for both is void and the judgt may be set aside without the formality of a motion for a new trial Thru 20. 1 Roll 925. Bac abr. Ex D 3. Contra Cod 135.

But one of two admrs cannot make a valid release nor can he so sell the effects as to bind the other they must both join to render any acts affecting the entire effects valid they are authorized to act jointly only, by the Letters. 1 Atk 462. Lowe 20. & 21. Contra Cod. 134

There is an Exception however to this rule when admrs have in their own individual capacity as in some cases they may. Thus when assets are taken from the actual possession of an Admr he may sue in his own name for in this case he may release the action 1 Atk 462.

For the action is considered as lost by two indirectness in their

own right — if one of two Co-Executors or Admrs dies the
the whole authority survives 1 Ves. 9. 3 Atk 509. 2 Ves 514. Bun A.G.
wh if two Exors are made residuary legatees, one may use the st
ee in the Prerogative Court for a moiety of the residuum for
good the moiety they are legatees, as men legatees they are
entitled to a moiety. As men Exors no action can
any case lie between them 1 Ld. 5. 4
But tho. the rights of Exors are indivisible yet one of two Exors
is not chargeable with the wrongs of his Co-Ex.
Generally Each is liable no further than assets come to their
hands. Co E. 318. Off of Ex 100. Po. 134
But whenever they are required to join a bond for the due
performance of their trust & a bond is given by them
for the good conduct of the whole, one is bound and liable
for a breach of the agreement by the other.
And By Common Law if all join in a receipt for goods actually recd
by one alone all liable for the goods in these cases how-
ever they are liable for their own act. Salk 318.
They are thus chargeable in Law and in Eqty in persons
of creditors. But in Eqty each is chargeable only for what
he has actually received as in favour of Legatees. 10 Mod 241
Salk 318. 1 Eqty Cas 398. 2 Vern 570. Cont. 1 Salk 81. 3 Atk 584. Ambl
314. Pre. Chan. 173 9 Brown C. 117.
As to the joining of Co-Ex in a suit &c See Tit Pleading, Dec.
As the whole number of Co-Exors make but one person in Law
they are generally to sue and be sued jointly the Rule is
inverse as to suits by but merely general as to suits
against such Co-Exors 9 Co 37. Cro 134. 4 Ph. 568. Salk 317.
If then one of two Co-Exors brings an action alone and generally
if a sole action is brot against one of them the action is Mai-
-able. —

But if Trespass is committed on the goods & goods of the Testator in the hand of one Co Ex.r he may sue the wrong doer alone as in his individual capacity Ord. 134. Off of Ex. 104. 1 Atk. 462.

There is one decision to the contrary on the ground that the possession of one is the possession of both, but this maxim applies only to when they act as Co-Ex.rs 3 Leon. 209.

Of Executors de son tort

An Executor de son tort is one who without any authority from the deceased or the Ordinary does such acts belonging only to the office of an Ex.r or Adm.r i.e. he is an usurper of the Authority 2 Blk. 507. Off. of Ex. 171. 2 Leon R. 49. Toller 37. 2 Blk. 507. meta intuitus rei alienari, in you with the assets of the deceased person will make a stranger Ex de son tort. as if one takes possession of the assets, pays or receives debts. Indeed it has been observed that the mere nothing of a Coro. has this effect 5 Co 33-4, 31 Off of Ex. 171. Toller 38. 2 Ro. 100. Hob. 49.

If a Legatee of a specific Chattel takes it without the permission of the Exec.r he becomes an Ex.r de son tort.

So if a stranger sued an Ex.r answer to the suit without pleading that he never was Ex.r he makes himself Ex.r de son tort. Ord 91. Toller 38. Off of Ex. 174.

If the widow of a deceased man takes more apparel than is necessary to her degree she makes herself Ex.r de son tort. Roll 918.

And if the stranger takes the assets and delivers them to another the latter is Ex.r de son tort 2 Blk. 507.

But the most usual case of an Ex de son tort. is that of a fraudulent conveyance of goods by the deceased himself. In this

case if the donee takes possession he is an Ex. de son tort. For a fraudulent gift being void by Stat. as against the creditors of the donor. & the donee is considered as taking possession of the donors goods, this rule holds however only in case of Creditors. for the gift binds the donor and his representatives tho' not as against creditors. Taking the Ex. as de son tort is the only method by which the gift can be set aside Yelv 197. 1 Roll 549, Co Lit 24, 2 Ro. 57.

But there are some acts which a stranger may do, relative to the effects of the deceased without making him an Ex. de son tort. Any acts arising from motives of humanity & charity comes within this description, as if he should feed the cattle to prevent their suffering, or should expend the wedding when they require it - these are considered acts of Charity Cro 94. 2 Bulst. 507. Law 51.

and I would think that the case of milking the cows with an intent to prevent her suffering for want of milking would be the same. for it is an act of humanity

4 C.

Defraying the funeral expenses of the deceased out of his effects does not make an Ex de son tort. Off of Ex. 174. Toller 40. 4 Bac Ab 256.

Where a stranger takes possession of the effects under a claim of property, unless the claim is merely colorable, he is an Ex de son tort. Dyer 166. B.

Intermedling in the real estate in any way does not make an Ex de son tort, for an Ex has no claim to real property hence the act does not interfere with the Ex's rights in and

What acts are sufficient to make a stranger Ex de son tort is of course matter of Law. The Gen Rule is, viz. the acts done as to warrant the inference that he claims the mere

agreement of the assets as representative of the deceased is
renders him Ex. de son tort; but not otherwise 2 Str 99.
Dyer 166 B. Bac Abr Ex &c. B. 1

But these cases apply only to cases where there is no rightful
Ex. or Admin. at the time of the acts, for after Probate of the
will and acceptance of the trust or when the Ad. has alle-
administered which is a virtual acceptance of the trust
or after administration actual granted common acts of
intermedling will not make one Ex. de son tort, the wr-
ong done is dealt as a Trespasser to the rightful representative
what the representative recovers becomes assets for the pay-
ment of debts and legacies 5 Co 34-4. Salk 313. 302-7. Follet 40
But even in these last cases if a Stranger intermeddles
and claims to be Ex. he is chargeable as Ex. de son tort tho
there is a rightful representative 5 Co 34. a. Salk 313. Hob 44. Follet 40
But when the wrongful intermedling is before probate or ad-
administration granted, the Ex. de son tort must deliver all
to the creditors, unless he delivers over the goods to the right-
ful representative before any action against him by the
Executor, But the commencement of a suit by a cred-
itor attaches the right of recovery to the executor which
cannot be defeated by a subsequent delivery of the
goods 5 Co 33. b. Cro. E. 565. Hob 49. 3 Mod. 587. 2 Bla Rep. 26.
The principle on which a creditor holds a rightful claim on
the Ex. de son tort is this. That from the Ex. acts creditors
have a right to consider him as the rightful representative of
the deceased and he cannot discharge himself by re-
butting a presumption which arose from his own wrongful
act 2 Str 99. 2 Bla 567. 12 Ellis 471.
But such an Ex. acquires no interest in the assets tho, he is li-
able to be sued as Ex. not can he maintain any action

in the character of Ex.r 12 Mod 472. 2 Bl Rep 507. Foller 243, 366.
So he cannot like any legal representative retain any part of the assets for the payment of any debt due to himself. A legal Ex.r or representative may retain assets for the payment of his own debts as against all Creditors of the same degree Co E 63 b. 12 Mod 441 - 71. 5 E 30. 2 Mod 51. 2 Bl Rep. 507.
But if such an Ex.r has advanced his own money to pay debts due by the deceased, he may retain assets to the amount so advanced 1 Sid 76.
Yet the law does not intend to subject an Ex.r de son tort to any actual penalty, tho, it prevents his acquiring any civil benefit. But if one after wrongfully intermeddling, procures letters of admn. they by relation purge the original wrong and vest in him the same right that their admrs. have, hence he may retain assets for his own debt - 2 Ken Rep 26. 12 Mod 471 - 2. 2 Ven 179. 3 Sk. 540.
Still an Ex.r of his own wrong may be sued as Ex.r even after obtaining Letters of admn. for it is said he shall not discharge himself by any matter ex post facto. This reason goes however farther than the rule, the meaning of the rule is, that he may be described as Ex.r even after he has obtained Letters of admn. Co E 102. 365, 565. 810, Bac Ab. Ex.
An Ex.r de son tort is liable so far as he has assets, to the legal representative, to the creditors of the deceased and to the legatees, for his act affects all their rights Cro 104 Cro Ex. 257. 5 E 30. Hob 49. Com Dig Admr B 1.
But when sued by the legal representative the Ex.r de son tort is described as a common trespasser Cro 103. 4 Ven 349. Title 384.
Still if the legal representative is a creditor of the deceased he may bring debt against the Ex.r de son tort as the cr

with an averment that he has no assets in his hands if he has assets he may retain them and sue the Ex de son tort as a stranger. 1 Roll 940. Salk 364. Bac Ab Ex. A. 10.

But in actions by creditors against an Ex. de son tort he is sued as if he were the rightful representative of Ex. 5 Co. 31 a. Yelv 137. 1 Mod 208. Tollin 473. Com Dig Admr E. 1.

As a Gen. rule an Ex de son tort is liable to the amount only of assets received, and as against creditors he is allowed payments made to any other creditors of equal or superior degree.

When he has applied all the assets for the payment of creditors he may plead "plene administravit" and adduce the payment in evidence against a suit by another creditor Tollin 364. 2 Bac 567-8. 5 Co 30 B. 9 Co Ex 185-1 Cro 104.

But as against the rightful representative he cannot by pleading such a payment bar an action of Trespass or Trover. If in trespass or trover by the rightful representative the Ex de son tort may give in evidence under the Gen. issue the amt he has paid and thus mitigate the damages tho it will not bar the action. But this last rule is equitable. he cannot mitigate the damages as above if doing so would prevent the rightful representative from recovering his own debt. 12 Mod 441-71. 2 Bac 567-8. 5 Co 30 B. Cro 104. 2 Ven 23. 1 Ven 349.

Indeed, it is said damages cannot be thus mitigated if it would prevent the rightful representative from preferring one creditor to another of equal rank. but the principle of this rule is not very obvious and I think very doubtful. in an action brought against an Ex. de son tort as Ex. he pleads he never was Ex. he is liable for his misfeasance to the

whole demand, notwithstanding the rule that he is liable only to the amount of assets received Noy 69. Co Eliz 472. Off of Ex. 257. But it is said he may be relieved in such case in Equity if the assets to be received have been very small. I doubt this rule on good principles 2 Ver 147-8.

If there should be at the same time a rightful Ex.r and an Ex.r de son tort, they may be sued either jointly or severally at the Election of the creditor.

But where there is a rightful Administr. and an Ex.r de son tort they cannot be joined, for both Admin.r and Ex.r cannot co-exist quoad the same assets. Off of Ex 255. 178. Toller 473.

At Law the Ex.rs and Admr.s of an Ex.r de son tort were not liable to the creditors of the original deceased. Tho. if they had assets of the original estate they were liable in Equity as trustees. But now by Stat. 30. Geo 2.d The Representatives of an Ex.r de son tort are liable to the creditors of the original deceased 2 Atkd 293. Bac Abr E. B. 3 Com Dig Adm. B. 3. Toller 474.

What property appertains to the Personal Representative

On this subject there has been frequent and long dispute.

The whole personal estate in general rests in the Ex.r on the death of the Testator, and in the Admr as soon as adm.n granted. the letters have relation to the death of the intestate and give the Admr a retrospective title 2 Roll 544. Com. Dig Admr. B.1. 10-11, 1 Jac 209.

The interest of this representative however is temporary and qualified. he takes the goods in the right of others. he is in the nature of a trustee. for he is entrusted only with the disposition of the Property. Off of Ex 85-8. Toller 134.

Hence an Ex.r or Admr.r cannot perfect the assets by his

creditors 2 Blk 177. Toller 135. Nor are the assets liable for his own debts unless he has made them his own by converting them to his own use & consents to their being taken which is a virtual conversion 1 P Wms 319. 2 Bur 1369. 1 Atk 158. 1 Bos & Pul 293. 4 T R. 621-5. W. 632.

Neither an Ex^r or an administrator can bequeath the trust, Plow 525. Off of Ex 86. Toller 135.

The effects in the hands of the Ex^r or adm^r as such are called assets from a French word signifying a "sufficient" Fund. al estate & real estate as mortgages. Chattels personal &c, 2 Blk 386. Cro Car 371. Off of Ex. 53-4. 73. Toller 139.

But there are certain descriptions of Property partaking both of the nature of real & personal property relative to which there has been much dispute

All such crops as are raised annually by labour and culture belong to the Ex^r or adm^r the appurtenance to the land at the death of the testator These products are called emblements 1 Ves 55. b. 2 Blk 122-3. Com Dig. Toller 150. 194 Such as were not then raised go to the heir.

And if the land is devised the emblements go to the devisee and not to the personal representative, for it is said that the devisee stands in the place of the Ex^r - A better reason is that he takes as a purchaser Hob. 132. Gil Ev. 248. Toller 203. 2 Blk 428.

Some have held that roots growing in the ground are the property of the heir, Toller - Off of Ex 57. 62-3. Gil Ev. 249 - The moveables of the deceased belong of course to the deceased personal representative 2 Blk 387-9. Off of Ex 57.

Stock in public funds belong also to the representative, tho however may seem doubtful for stock is strictly incorporeal Toller 151.

So when an annuity is granted to one and the annuitant dies. The person representing the annuitant is entitled to the instalments still due 1 Ves 402. Com Dig Rents C 1. Toller 179.

Manure left in a map on the ground of the deceased is also personal Stile 66. Toller 150.

The Ex. has also a lien created on the person of the debtor under an arrest on the Testators Execution. For it is a plea to secure personal property Off of Ex 56. Toller 151.

The interest of a Negro slave also belongs to the Ex. This Interest is rather in the perpetual service than the body of the slave 2 Blk 403. Cow 396. Ld Ray 147. Salk 667.

In general however the Ex. has no claim to the services of a mere servant, on the death of the testator Stra 1115. 1266. 2 Ves 35. Doug 70. Toller 152

The Ex. has by Stat Law. an interest in the Testators Leasehold Property and Patent rights. I think this Stat in affirmance of the common Law. Toller 152-3. Stat U.S. Ex. improvements. But the Ex. has no interest in the property held by the testator in trust for a third person. For the Relator trust was fiduciary and he had no beneficial interest therein Salk 79. Toller 153-4.

Mol is a Person seized the affairs of the province until the day of redemption is past for till then it is redeemable at Law. Touch 498. 154. 2 Blk. 395. 6.

In certain cases when the Testator was entitled to a recovery of damages for injury done to his property the Ex. may have the action in others the heir has the right Off of Ex 70. Latch 168. 1 Ven 189. Com Dig Admr B. 13.

In all cases it lies in action arising before the Testator.

death are not per se assets. tho. the money when recovered is assets. Salk 207. Co E. 43. Hob 66. Toller 162.

But there is an exception to the rule, that the Ex. is not chargeable to the Ant. of the cause of action when he has released or converted it to his own use, for he is presumed to have received the value in, ant.

The particular species of property which has occasioned so much dispute is personal property annexed to the realty.

Chattels so affixed to the freehold as to be deemed a part of the realty, go to the heir and not to the personal representatives. Thus; rent arising from the freehold after the Testators death goes to the heir when the Testator owned the freehold. If the interest of the Lessor had been personal property, the rent would go to the Ex.r for rent is incident to and follows the reversion 2. Blk. 42. 8. 1 Ins 47. n. 9. Co Cu 207. Toller 176-7. 2 Saunds 376. Off of Ex. 53. 1 Ins 8. n 10. 2 Blk 393. Toller 193, 41-8.

Person chattels called heir looms go to the heir and not to the personal representative, for these are regarded as looms or limbs of the inheritance and go with it; thus Doves in a dove house go to the heir 1 Ins 8. 338. 2 Blk 427. Co. 15. b. Toller 192-6. Off of Ex.r 53.

Wood growing on the Land, Fruit growing on the trees and Grass growing on the land, go to the heir at law, at the death of the Testator, for they are permanent growths Com. Dig Tit Biens A. Off of Ex.r 50. Toller 193.

The same rule holds of fences in, ant.

Fruit things sown or planted by the testator not yielding an annual profit go to the heir. 2 Blk 123. Toller 194-5. 1 Ins 55. Co. But trees growing on the land of another which

have been purchased by the testator go to the Exec^r. So Trees reserved on land and sold by the testator go to the Exec^r. In neither of these cases does the land go the heir. The interest in the trees is severed from that of the Land Offyle 57, 60. Yel. 145. Such chattels as are strongly affixed to the freehold and cannot be disremembered, without injuring it go to the heir as affixed chimney pieces, fixed tables, pumps fixed in a floor Sk. 2 Blk. 427 8. 12 Mod 520. Offyle 62. 4 Co. C. 63-4. Tolle 196-7.

But between Lessor and Lessee any thing annexed by the latter for the furtherance of his trade, may be severed during the Lessee interest. if it can be done without substantial injury to the freehold as a furnace for dying not actually affixed to the walls of the building 1 Atk 477, Salk 368. Off of Ex. 60-1.

And modern Policy has very much favoured the rights of severance as between lessor and lessee, tho, whatever chattels can be severed without injury to the fabric of the building & the rest of the freehold go to the Lessee and his representatives, this rule is confined to the single case of Lessee, Amhler 113. Stra 1141. Tolle 198, 4 Burrs E. L. 2547.

Hangings about a room, Tapestry, beds fastened to the ceiling, belong to the Ex^r. so of iron Backs to Chimneys Stra 1141, Atk 477, 1 P. Wms 94.

And in favour of Trade removing vessels, vats for dyers, copper boilers, furnaces fixed to the freehold academies on land go to the Ex^r tho, they are all condemn as fixed Salk 368. 1 Selw. N.P. 34. 1 Atk 477. 3 East 38. 3 Atk. 14. 16. 1 Ves 53 n 5.

On the other hand, an annuity for life of a parish

the not affixed, a monumental stone in a Church yard the coat armour of an ancestor all go the heir at Law, 1 Ins 18. b. 2 Blk 429. Toller 199.
A Pew in a church owned by an individual belongs to the heir 12 Co 105. 2 Blk. 429. Toller 199, 200.
The offspring of the Testators cattle and the wool of the sheep go to the Exr. Off of Ex. 83. Toller 166.
And Chattels whether real or personal given to a corporation sole go to the Exr and not to the successor quasi Lex. and takes only real property even if personal property is expressly limited to a sole corporation and its successors it will still go to his Exr. Com Dig Biens. C. Franchise H. 16. Toller 201-2, 4 Co 65. 1 Ins 9. a.
If an obligation is given to a corporation sole and his successors it will still go to the Exr 4 Co 65. 2 Blk. 430-1. Toller 202.
The rules respecting sole corporations can from their nature have no relation to aggregate corporations for corporation aggregate never dies. 4 Co 65. 1 Ins 9. a. Toller 201.
A donation mortis causa, does not go to the personal representative but to the donee, Where one in his last sickness and in fear of death, delivers or causes to be delivered to another the possession of any personal chattels to be retained by the donee in the event of the donor's death. is a donatio mortis causa. 1 P Wms 404, Toller 233-4. 2 Blk. 514. Ch Cases. 269.
In every such gift there is an implied condition that if the donor recover from his existing illness the chattels shall revest in him, in ident.
To complete such gift there must be an actual delivery of what the law accounts such in the donor

life time. otherwise the chattel will go to the representatives
1 P Wms 404. 2 Ves 431. 1 P Wms 441.
But when actual delivery is impossible if that is possible towards the delivery is done. it will be effectual. Thus a delivery of a Bill of Sale will be a good gift of a Ship at sea. 2 Ves Jr 120. Toller 234.
And what is sometimes called improperly a symbolical delivery will be sufficient. thus if a thing is Bulky. delivering the Key of the room. where it is a good delivery 2 Ves 434. Delivering the key of a trunk has the same effect. Pre. Chan 300. 2 Ves 441-3. Toller 234.
But a delivery strictly and properly symbolical is not sufficient. thus if the donor shewed all over a coin as the symbol of a ship a watch &c. it is not good for it is neither a delivery of the ship nor as in the above cases. the means of obtaining it. Toller 235. 2 Ves 431. 440.
Any Specific Chattel may be the subject of such a gift as a bond or Bank Note. but all species of personal property cannot be so given 3 Atk. 214. 2 Ves 441. 4 Bro Chan. 72. 1 P Wms 404. 3 ib 356. 2 Bro. Chan. 612.
But a bill of Exchange or promissory note cannot be the subject of a donatio causa mortis at C Law. they are regarded at C Law as mere evidence of a parol promise, so arrears of rent cannot be thus given 3 P Wms 356. 2 Ves. 442. 4 Bro Chan. 291. — An absolute gift taking effect in presenti cannot exist as a donatio causa mortis. Toller 236. 4 Bro Chan. 286. 2 Ves Jr 120.
A gift of this kind becomes absolute on the donor's death

hence the act need not be proved as a part of the donor's will and as it never vests in the Ex.r his absence is not necessary 1 P Wms 441. 3 do 357. 2 Blk. 514. Toller 236.
But such a gift can never prevail against the creditors when there is a deficiency of assets for it is without consideration and therefore voluntary. 2 Ves Jr. 120. Toller 237. 2 Blk 514.
There are various ways by which the Ex.r may make the testators property his own. he being subject to account for them. They may become his own by consequence on coming into his hands. Thus money left by the testator becomes the absolute property of the Ex.r when it comes into his hands For it is said it cannot be distinguished from the Ex.r money, the better reason is. that since the same amt. wie be of equal value the Ex.r is not expected to retain the specific money left as assets Off of Ex 89. Toller 239. Hence the creditor of the testator cannot take such goods money on Execution as the goods of the testator Off of Ex 89. Toller 238.
But it may be taken by a creditor of the Ex.r as his own assuming that money can be taken on Execution.
So where the Ex.r is creditor of the Testator to the amount of the assets. they all become absolutely his by operation of law as against all others creditors of equal degree This is from necessity for he cannot sue himself Plow. 185. Toller 295. 39.
The assets may become the Ex.r by some act of his own Thus if he advances money of his own he may select any of his assets. and thus make them his own but he must take them at an adequate price, Off of Ex 89. Dyer 187. b. Plow. 185.
And if he pays rent with his own money on the tes

-tators lease, the profits of the lease to the amt. of the rent is his Off. of Ex. 90-1. Toller 234.
He may make them his own by purchase of them when sold on Execution, ins. acct.

Of Legacies

A legacy is a testamentary bequest or gift of personal property. 2 Atk. 512. Toller 291.
All persons are capable of being legatees with some special exceptions at the Law and by Stat. ins. act, 1 Ind 112 1 Atk 442. n. 1 Ph. Ch. 342. 2 Brown Chan. 820. 1 Ves. 115.
Legacies are of two kinds viz. General & Special.
General legacies express such as are pecuniary, or such as are denominated by quality alone without further description; or such as are described by a certain portion of the testators property, or such as are described by weight or measure
Specific Legacies are of two kinds. 1st When the bequest is of a specific chattel so described as to be distinguished from all other chattels of a similar kind, and 2dly When a chattel of a certain species is bequeathed without designating any one in particular of that species. Toller 300-1. 2 Brow. chan. 113.
A specific legacy of the first kind can be satisfied only by a delivery of the specific chattel. But a legacy of the second kind is satisfied by a delivery of any of the chattels of the species designated. 2 Ford. 374. 1 Atk. 416. Amb. 57.
A Legacy of a certain sum of money is not specific but general as distinguished from specific and pecuniary as dis-

tinguished from other property. 1 Ves 364. Toller 301.
Courts are in gen. averse to construing legacies as specific, for it gives a priority over other legatees, Amb. 310. Toller 301.
Even a pecuniary legacy may be specific for it be described by circumstances which render it distinguishable from the rest of the Testators money; it is specific 1 Atk 508. 3 Bro Chan. 160. 1 P Wms 540. Toller 301-2.
A debt due from A. on a certain Bond, is a specific legacy. So a bequest of all the Testators Stock in a certain Bank. Amb 310. 1 P Wms 403. 1 Ves 425. 1 Eq Cas. 298. 3 P Wms 384. 2 Brow Chan. 113-4-25.
If one bequeaths to B. all his personal property in the town of A it is a specific bequest. Pr Chan. 392. 2 Ver. 688. 2 Ambl 376.
If a Testator bequeaths so much Stock, at his death has not so much, the bequest amounts to a direction to the Testators Exec. to procure to the amt. prescribed. Yall 227. Toller 303.
All Legacies are divided again into two Kinds 1st Vested & 2 Lapsed.
A vested legacy is one in which there is a present, or priveledge of present or future enjoyment.
A Lapsed Legacy, is one where the legatee dies before the Testator, in this case the legacy lapses and sinks into the residuum 1 P Wms 88. 1 Brow. Chan. 142. Toller 304.
And in such a case the legacy will lapse tho it be given expressly to the legatee his Exrs or Admrs for the Exrs or Admrs takes only from or thro. the legatee in whom it cannot vest 3 Brown Chan. 224. Toller 304.
And tho the Testator shewed express an intention that the legacy should not lapse in the event of the legatee dying before him only. It will lapse. 3 Atk. 572.

But if the will provides that in case of the legatees death before the testator, the bequest shall go to another this contingent legacy may take effect, 3 Brow Chan. 224. 3 Atk. 572, 580. 1 P Wms 274. 2 id 331. 3 id. 118. Pr Chan 37.

But if a legacy is given to two or more no part of it lapses on the death of one of them, before the testator, the whole vest in the surviving legatee, 2 Atk 220. 2 P Wms 331. Toller 304.

But if the residuum is given to two as tenants in common and one dies before the testator, his moiety does lapse for the interest is made several and distinct as much so as if the legacy were one half to one and the rest to the other, Toller 343. 10 Mod 700. 2 id. 529.

This rule is laid down only of the residuum, I think however it will hold of a particular legacy.

A legacy to one person does not lapse on his dying before the testator, provided it was to him in the character of a trustee, for the beneficial interest never is in him 1 Ves 140. 2 Vern. 468. 2 Ford. 369. Toller 304.

If a legacy is given to A payable at a certain age it is vested and on his death after the testator and before he attains the age specified it is transmissible being a debt in presenti, solvendum in futuro. But if it is given, to A payable at, when he shall attain a certain age or provided he attains such an age it is contingent and lapses on his death, before the age specified, 3 P. Wms 138. Toller 141 2. 305. 1 Ves 144. 1 Brow Chan. 179. 2 Vern 347. 1 id. 462

A legacy whether gen. or specific gives only an inchoate right to the consummation of which the Ex. assent is necessary for he turns the legal title and the assets may be deficient 2 Atk. 512. 2 Atk. 195. 2 do 240. 1 P Wms 554. 2 do 645.

If the assets prove deficient the legatees must abate or entirely fail according to the extent of the deficiency. If the Ex^r pays legacies when the assets are deficient he becomes liable to the creditors pro tanto Off of Ex 27-8. Toller 8^c. But his assent, in evidence of assets and amounts to an admission on his part which he cannot retract or contradict, that he has effects for the payment of debts. If then a legatee takes possession then without such assent the Ex^r may maintain an action against him Off of Ex 27. 223. 3 Atk 240. Toller 307.

The rule is the same even tho the testator showed in his will authorise the legatee to take possession without such assent Off of Ex 28-9. Toller 307-8.

Yet before the Ex^rs assent the legatee has such interest in a vested legacy that if he should die before it is paid it will go to his representative Off of Ex^r 28-9. Toller 307-8.

And when a testator by his will releases a debt due to him it seems that the effect of the release is constituted by the assent of the Ex^r for a testamentary release is in the nature of a legacy to the debtor. Off of Ex. 29. 30. 2 P Wms 332. 1 ib. 83. 3 Atk 530. Toller. 308.

This assent may be inferred from words & acts of the Ex^r and not only express words but any other are sufficient to ground this inference, thus congratulating the legatee, offering to purchase the legacy and it is said advising a third person to buy it have been construed into an assent Com Dig Admin^t B. 6. Off of Ex 226 Toller 309. Vern 456. 2 Ven 258.

And if a term for life is bequeathed to A. remainder to B. assent to the legacy by A. is an assent to the remainder

of B. Com Dig Adm. E.6. 10. 10 Co. 47. b. 3 P Wms 12.
The assent may be conditional. But the only condition that the Ex.r can prescribe is a condition precedent Off of Ex.r 238. Com. Dig Adm. E.8.
But a condition subsequent annexed to a legacy by the Ex.r is void. A condition precedent doesnot but a condition subsequent does alter the nature of the interest Yoller 311. Off of Ex 238.
Their assent has relation to the testators death, i.e. it vests the interest as from the death of the testator hence the assent will confirm a previous transfer of the legacy by the legatee. Off of Ex 249-50. Yoller 211.
An assent before probate of the will is good. for the Probate is only evidence of the right of the Ex.r Off. of Ex 85. Yoller 46. 312, vide ante, authority of Ex.r before Probate, Page.
As to the time of paying legacies it is a gen rule that the Ex.r is allowed a year from the testators death, for the payment of legacies Salk 415. Yoller 312.
If a legacy is made payable with Int. tho in future the legatees representatives are entitled to principal and interest. If he should die before the time of payt arrived For it appears clearly that a benefit accruing before the time of payment was intended Amb 588. 1 Ves 307. 2 id 118. 1 Brow Chan 105. Yoller 171. 305-13-25. Fam 238. 480.
If on the other hand the legacy were made payable at a certain time with Interest until that time his representatives would on the death of the legatee be immediately entitled to the whole interest as well as principal in such.
If a legacy is given to A. when or if he shall attain full age. with condition that if he does not attain full age

then to B. If A dies before full age, B will take immediately on A's death. 1 Eq. Cas 299. 300. 2 P Wms 478. Tollet 313-25.
The gen. effect of a condition precedent and that of a condition subsequent is the same as is explained in the title of Contracts. vide "Conditional Contracts"
If the condition precedent is originaly impossible the legacy necessarily fails 2 Roper 43. 1 Jur 206
And if such a condition becomes impossible by the act of God or by act of the testator or of law, the effect is the same, in law.
By the Civil Law, the conditions in these cases are void and the legacy absolute. In legacies of Personal property alone in Eng. the Civil Law governs Roper 40. 1 Jur 206.
A condition that the legatee shall not dispute the will is considered as only in terrorem. Hence if there is probable cause to dispute the will, an attempt by the legatee to set it aside does not forfeit the legacy. In devises the rule is directly the reverse of this. The reason is that the civil Law governs the Court having the jurisdiction of legacies, while devises are governed by the C. Law. 1 Bro Ch. 168. 2 Atk. 404. 2 Ves. 90. 3 P Wms 344.
When the property given, then is merely personal, the rule is as above. But if the legacy is limited over to another person, on breach of the condition, the first legatee forfeits his interest after contesting the will because Cause 2 P Wms 526. Roper 49.
The most usual legacies annexed with conditions to children are those relating to marriages
By the Civil law all conditions in restraint of marriage are void as inconsistent with public policy. Cts of Eq. have so far conformed to this rule, as to consider all con-

ditions restraining marriages in gen. i.e. restraining the legatee from marrying at all as void 1 Wils 130. Roper 50 51. 3 Atk 330. 365. 507. 1 Atk 500. 3 ib 504. This general rule obtains as to both conditions, subsequent & precedent, in. that condition restraining marriage as to him, place and person are in general valid in Equity tho void by the Civil Law. in any of these cases non-compliance is a forfeiture 1 Ves 20. 4 Brown P.C. 194. Roper 51.

But there is one instance in which a condition restraining marriage altogether is valid. A husband may annex such a condition to a legacy to his wife, for the interest of the family may require her to be married Godolph 45. Roper 51.

And when the condition goes to the restraining of the legatee altogether and when the legatee is not the testator's widow if the legacy is limited over to a third person on breach of the condition, the condition is valid 2 Ves 357. 452. 2 Atk. 615. 1 Brown Chan. 303. 2 ib 431. Roper 52. Contra 2 Atk. 184

I would here observe that by the report of a professional gentleman, this rule has lately been denied

But by some authorities the rule goes further. It is said If the condition is in restraint of marriage altogether and the residuum is limited (q.) over to a third person the condition is valid 1 Eq Cas 112. 2 Brown Ch. 431-63. Roper 56. Contra, 2 Ves. 293. 3 Atk. 364.

The preceding rules which render conditions in restraint of marriage void hold only in the Ecclesiastical Courts which follow the civil law. i.e. in cases relating to personal property alone. Hence when the legacy relates to land, Chancery will give full effect to such conditions whether there is a limitation over or not. and it is

added unless the condition is unreasonable, this qualification is extremely general. 1 Atk. 361. 3 id 330. 1 Ellow 300 -8-9. Ripon 55-6.

To whom Legacies are to be paid.

It is a gen rule that the Ex.r has no right to pay a legacy to the father or guardian of an Infant legatee without the sanction of a Court of Equity 3 Brow Chan. 97. 1 Ch. Ca 300. 10 Mod 285. 2 Atk. 81 But where the legacy is too small to warrant an application to Chancery, payment to the father or the infant himself is said to be valid 2 Atk. 81. Com Dig Ch 7. 3 Ch. Off of Ex 219-20. 2 Brown Chan. 613.

If an Ex.r has by the will a general power to divide a legacy among children at his own discretion, Chancery may control an obviously unreasonable division 1 Ver 66. 355. 2 id 513. 2 ver 640. Tall 472. 2 Ver. 421. Com Dig 4 W. 11.

But in such a case the Ex.r should allot but a small portion to one legatee. Equity will not set it aside, if the Ex.r has been guilty of gross misbehaviour 1 Ver 57. 2 id 640. 1 JR 432. 5 Ver Jun 149.

A Legacy when given to a feme covert must be paid to her husband 1 Ver 261. Toller 320.

And if he pays to the feme the hus.d may subject him.

Ademption of Legacies.

The ademption of a Legacy is the taking away or revocation of it by the testator the revocation may be express or implied 1 Fonb. 353. Toller 329.

A revocation may be implied by the act of the testator

thus when after a provision made by will for a person the testator gives him a sum of money as a settlement for life this is an ademption of the legacy provided the sum given was equal to the legacy 2 Ford. 354. P. Wms 680. 2 Ver 115 Yoller 329. Ro chan. 183. 2 Atk 214. 3 Brow chan 307. 8 ib 61.

If the bequest had been residuary a subsequent advancement would not be an ademption for a residuary legacy presupposes that all other objects of the testators bounty are provided for. 2 Atk 216. Yoller 329-30.

Nor is it an Ademption if the advancement may be depeated i.e. is contingent 2 Atk. 471.

Nor is it an ademption unless the legacy and portion are given on same account. Yoller 330. 1 Brown Chan. 425.

Nor is the legacy ademed if the portion is absolute when the legacy is contingent. 1 Br Ch. 192. Yoller 330.

If the testator is one who is not a near relative to the legatee the portion does not adeem the legacy 3 Br ch. 499. 2 Atk 516. Yol 330.

The presumption of an intention of ademing a legacy raised from a subsequent portion may be rebutted on the principle of rebutting an Equity 2 Atk. 516. 2 Brow chan. 499. Yoller 310.

All these rules are founded on the supposed intention of the testator. A question of Ademption is always then a question of intention. But what amounts to evidence in such a case is not settled.

When a gen. legacy is bequeathed out of a specific fund the use of that fund by the testator has been held to be no ademption. The later opinion is that it is an ademption Roy 335. 1 P Wms 777. 2 Br. ch. 105. Contra. 1 Br ch. 431. 2 Ford. 364. n. Yoller 330-1.

But it is agreed that when the bequest is of a specific chattel

and the testator afterwards consumes or disposes of it or so alters it or so alters as to change the description in the will the intention being in this case apparent it is an ademption 3 Brow. Chan. 110. Toller 332 333.

And if the legacy is of so much stock. selling the stock is an ademption 3 Br. Ch. 108. Toller 333.

But if after transferring the stock the testator should buy other stock answering the description in the will the after purchase pass. Talbot 226. Toller 333.

And if part of the stock bequeathed is assigned by the testator and is not replaced it is an ademption pro tanto 2 Br. Ch. 108. Toller 334

There are sometimes what are called cumulative legacies i.e. two or more legacies may come to one person under the same will. The question whether the second was not intended for the first is a question of intention 1 Brown Chan. 389. 2 ib 527.

When the same specific thing is bequeathed to the same person twice in the same will or first in a will and then in a codicil the legacy is not cumulative 1 Brow Chan. 392.-3. Toller 335.

The rule is the same when the same quantity is bequeathed twice in the same instrument, 1 Br. Ch. 392. n. ib 630 n. 1 P. Wms. 424

But if unequal qualities are given in unequal parts of the same instrument they are cumulative 1 Brow Ch. 392. 1 P. Wms. 423 Toller 335.

And the rule is the same when equal or unequal quantities are bequeathed to the same person by different instruments. is cited.

When two distinct legacies are made to the same legatee and it appears that they were both given for the same

ance, the legatee will take but one. whether they are given by the same or by different instruments Toller 336. 1 Brown ch 392. 1 Ves. I think the legatee would be entitled to the larger quantity

And when one bequest is given generally and the other for some specific object they are cumulative 1 P Wms 423. Toller 336.

When both the legacies are not equivalent generis, they are cumulative, being different it cannot be a repetition and is presumed not be intended as a substitute, In all these cases it is said. extrinsic evidence may be admitted on either side of the question 1 P Wms 424. 2 Bro chan. 527-8. Toller 336.

I think that there is good ground for admitting the evidence to rebut the Equity. But that there is none for its admission on the other side.

Of Legacies given by a Debtor to his Creditor,

In some cases where a debtor has given a legacy to his creditor it is considered as an intended satisfaction of the debt in others it is not so regarded. the Testators intention must govern Salk 155. 508. 2 Vent. 232.

In gen. it is said. that if the legacy is equal to the debt or greater than the amt of the debt it is a satisfaction Pre Chan. 394. 1 P Wms 132. 3 At. 353. Toller 337. 1 Ves 126. 1 P Wms 404. n If the amt of the legacy is smaller than the debt it is not a satisfaction of the debt even pro tanto. there can be no presumption of payment in this case Salk. 508. 2 Ld. 478. 2 P Wms 86

If the legacy is conditional it is not to be presumed

as payment, otherwise the testator might make the payment of his debts conditional Pre. Ch. 394. 2 Atk 300. 491. 2 P. Wms. 555. 1 Ves. 519. 2 Ford. 331.

If the legacy appears to be not equally beneficial as the debt in any one respect, it is not regard as an intended satisfaction, even tho in another point of view the legacy is more advantageous than the debt. pre Ch. 256. 2 Atk 300. 1 Bro Chan. 129. 295. 10 Wms. 409. n. 234. 2 id 614.

So also if the debt due was an open unliquidated debt no legacy is regarded as payment Toller 238. 10 Wms. 299.

And if the will was made before the debt was contracted, the presumption can never arise Salk 508. 10 Wms. 409. 2 id 343. 3 Atk 353. 2 Ford. 231-2.

But in all these cases parol declarations of the testator may be proved, to rebut the presumption tho, the will should afford presumptive evidence of such an intention, for this is merely an equitable presumption Toller 338. 3 P Wms. 354. 11 Ves. Jr. 542.

These rules in favour of the creditor, hold only as between creditors and mere volunteers claiming under the testator. Hence if a legacy to a creditor will apply to the debt where there is deficiency of assets. Toller 338.

And whenever a legacy is deemed a satisfaction of a debt it draws interest from the testators death. 3 Atk 97. Tol. 338.

Of Legacies given by a Creditor to his Debtor.

When a legacy is given by a testator to a debtor the debt is to be deducted from the legacy. the debtor is considered as having in his hands so much of the testators goods as the debts amount to Toller 338. 2 P Wms. 128.

if a testator bequeaths his debt to the debtor, it is a testamentary release and has effect as the legacy to the amount of the debt. but if the other assets are deficient the debt must be paid in part or in full as the case may require. 2 P Wms 332. 3 Atk. 580. 8 Co Ed 29. 30. 1 P Wms 53.

Of the Abatement of Legacies.

If there are assets sufficient for the payment of debts only all the legacies must fail, and if there are sufficient assets for part of the legacies the general legacies are liable first to abatement 2 Blk 513. 2 Vent. 374. Yelle 339.

The gen. rule then is, That General legacies shall abate in preference to specific legacies

But if a sum of money is bequeathed generally as a recompense for an injury done by the testator to the legatee or as a satisfaction for any debt or duty, the general legatee stands on the same ground with the other specific legatees. 2 Vent. 377. 1 P Wms 423. 2 d 25. Yelle 339-40.

But if one bequeaths his whole personal property in specific legacies and then gives a general legacy to be paid out of the personal property, the specific legatees are chargeable with the gen. legacy this is founded on the intention of the testator. for if he did not intend that the general should be paid out of the specific legacies he intended to make a nugatory legacy. Fletcher. 393. 2 Vent. 377-8.

And in case of a deficiency of assets for the payment of debts the specific legacies must also abate. But they do not abate in this case until the general legacies have abated Vent. 374. Yelle 340. 2 P Wms 382. 1 d 403. 2 Ved 411.

And specific legatees the preferred in this case are liable

to risks to which general legatees are not, thus if a specific chattel bequeathed is lost or destroyed, the legatee loses his legacy and is not entitled to a contribution from the other legatees but this is not prejudicial of general legacies 1 P Wm. 540. Toll. 340.

There are cases too in which a legacy is already paid is liable to be refunded either in part or in full

Thus if one pays a legacy when there is a deficiency of assets for debts, he may be compelled to refund 2 B & C 518. 2 Ves 360. 2 Ves 94.

If the fund be insufficient for the legacies only and one is voluntarily paid by the Exr. the other legatees can resort only to the Exr. and not the legatee who has been paid unless the Exr. is insolvent. But if he is insolvent Equity will compel the legatee to refund pro rata, 2 Ves 94. 2 Ves 205. Toller 341.

But if the payment was coercive as in pursuance of a sentence of a Court, the Exr. is not liable to the other legatees unless it appears that the fund was originally sufficient in which case he is liable, for he must have committed a devastavit.

When the payment was compulsory and the original personal fund was deficient, the legatee who has been paid is liable to pay it over to the other legatees, in act.

But a legatee is not bound to refund to the Exr. unless the payment was compulsory or unless there is a deficiency for the debts unknown at the time of payment, in these two cases Equity will compel the legatee to refund. A voluntary payment of Exr. admits that he has assets for the debts 2 Ves 205. Toller 342.

In either of these cases the legatee may be compelled to refund to the creditor, in act.

When the debts and particular legacies have been paid the residuum must be paid to the residuary legatee if there be none or if he is dead to his representatives Bac 52. Tolle 342 2 William Blackstone 514.

In general the residuum comprehends all lapsed legacies, for lapsed legacies must go either to the residuary legatee or be intestate property 1 P Wms 302. Tolle 343 But when there is a residuum and no residuary legatee or when the residuary legacy has lapsed the surplus is intestate property and goes according to the Stat of distributions 1 P Wms 700. 2 ib 529.

It has been a matter of doubt whether an Exr is bound in favour of legatees, to plead the Stat of Limitations in actions of debts due by the testator.

It is a rule that if the Testator bequeaths the surplus after payment of his debts and legacies, the Exr is not bound to plead this Stat, to preserve the assets for the residuary legatee, for the right of the residuary legatee is always contingent, and the testator manifests no intention to avoid the payment of debts. But it seems that Equity will compel the Exr to plead the Stat, in favour of other legatees, for their legacies are absolute, the residuary legacy contingent. 1 Eq. Ca. 305. 1 Br ch. 100. 15 Ves Jr 498.

Hence it appears that residuary legatees are postponed to particular legatees, the particular legacy then does not abate in favour of residuary legacies, but there is one exception to this rule, when there fails to be a surplus by reason of a devastavit committed by the Exr in which case General, Specific & Residuary legatees take pari passu 1 P Wms 305-6. n. 1. 2. Tolle 344.

The general and specific legacies must undoubtedly abate

in proportion to the amount of the devastavit, No reason is given for this rule. But I think it to be this. since the deficiency is occasioned by the act of the Exr. who is a third person, there is no more reason to make a residuary legatee a surplus than the others. Where there is originally a deficiency the residuary legacy is postponed. because it is always contingent.

of Legacies given to the Executor.

If a legacy is bequeathed to the Exor. the act of his taking it into possession is deemed to be an act of the Exr. and not of a legatee i.e. the act of taking possession is not deemed to be an assent to the legacy. if he took as legatee, he might be guilty of a devastavit. as if there were a deficiency of assets for higher claims 13 Co 47. 10 ib 17. b. Hz a 70. Off of Ex. 225. Com Dig Adm.n 5.7. Tollu 344.

But in strictness if Lard. the Exr.s assent is as necessary to his own legacy as to another Off of Ex. 22.27. 226. 1 Leon a 216. Tollu 340. This assent may be either express or implied any act shewing his intention to convert the property to his own use, is an assent as if he performs a condition annexed to it 1 Leo. 25. 1 Rolle 920. 619. Plow 539. 44.

And if a legacy is given to an Exr. expressly for his trouble in executing the trust. he must act as Exr. or at least accept the trust. to entitle him to it 3 Ves. ch. 95. Tollu 347. 3 Ves Jr 148. 4 do 212.

And generally an executor who is a legatee has no priority over other legatees of the same kind. The rules which have been laid down relative to abatement & refunding apply to an Exr. who is a legatee 2 P. Wms 25. 2 Blk 502. Tollu 347. 2 Ed 434.

The effect of a Debtor being appointed Executor to his Creditor

"If a creditor appoints his debtor his Ex.r the debt is at C. Law forever discharged. This is one of that class of cases in which the debt or duty on one side and the right on the other vests in one and the same person. 2 Blk 511-12. in which case the debt or duty is forever discharged Off. of Ex. 31. Salk. 399. Com Dig. Adm.r B. 5. 8 Co 136. 2 Blk. 511-12. And if one of several joint debtors or joint and several debtors is appointed Ex.r to the creditor the whole are at C. Law discharged Off of Ex. 31. Toller 348.

But the appointment of a debtor as Adm.r to his creditor does not discharge him for he is appointed by act of Law. The Court granting administration have no power to forgive a debt. the effect of such an appointment is that the remedy is suspended, on the death of the Adm.r his representatives are liable for the debt if all the other property is administered, Bro Cas 373. Salk 302. 1 Ven 303. 8 Co 136. Off of Ex. 32.

If an Ex.r marries the testators debtor, the marriage is no discharge of the debt at Law, it merely suspends the remedy during coverture 1 Leon 321. Salk. 306. Toller 349.

But in all these cases where the debt is extinguished at law the creditors of the testator may compel payment of the debt in Equity, provided there is a deficiency of assets. this union of the right and duty in one person is one of a class of cases called accidents, in which Equity alone can relieve. Off of Ex. 31. 2 Blk 512. Yonk 497-8. Salk 302-6.

The appointment of a debtor to the Ex. is in other words an involuntary or voluntary release which cannot stand against creditors.

But such a release is good both at Law & Equity as

against legatees. It is virtually a specific legacy and is may return it against all other legatees Toller 347-50. 1 Ves 264. n. 1.
The rule that the Exr's debt is extinguished admits an exception in Equity, when the presumption of an intended extinguishment on the part of the testator is rebutted. The presumption may be rebutted from express words in the will or reasonable deduction from it Talv. 160. Toller 350.
If a pecuniary legacy is given to an Exr the fact rebuts the presumption of an intended extinguishment, in such a case the debt is assets in favour of legatees even of residuary legatees and where there is none, in favour of the next of kin 4 Brown P.C. 180. 1 Brow Ch. 110. Talbot 240.
So where it appears from the will that the Exr regarded the Testator as a mere trustee of his personal property the debt is not extinguished Toller 350. 11 Ves Jr. 87.

The Executors right to the Residuum

The personal Estate of the testator devolves on the Exr, even if after payment of charges, debts & legacies, there is a surplus it regularly vests in the Exr. 1 P. Wms 350. Toller 351. 2 Ford. 131. 14 Beav. 13.
But if it appears from the face of the will either expressly or by implication that no beneficial interest was intended for the Exr he can take none and the residuum will in Equity go as intestate property, in such.
Thus if the Exr is called in the will "Exr in trust" the above rule applies 1 P. Wms 550. n. 1. 1 Ves Jr 62-3. 2 Ves 4. 2 P. Wms 158. 2 Atk 18. 2 Brown 634. 3 ib. 28.
So if a testator makes any one his official and not his individual capacity, his Exr (the Exr) is not regularly entitled to the residuum. Thus when one appointed the American Minister at H. Court

of St. James, his Exr. it was held he was not entitled to the residuum 1 P Wms 550. n. 1. 2 Ves. 91. 495. 2 Ves Jr. 98. 4 id 17.

When the will contains a residuary clause which wrongs the Exr. was held not to be entitled to the surplus, It was said that the testator by erasing the clause intended to leave the property intestate, Yoll. 352. 1 P Wms 549. —

So when the residuary legatee dies and the legacy lapses the Exr. has not the residuum 3 Br. Ch. 28. Amb. 769. 1 P Wms 550. n.

The rule is the same when a particular legacy is given to the Exr. expressly for his own trouble in executing the trust 2 Amb. 131. 2 Ves 97. 1 Ver 473. 2 id 148. 2 Atk 46. 2 P Wms 158.

And a pecuniary legacy bequeathed generally to the Exec. has been held sufficient to bar the Exr. having the residuum The testator giving him a part shews that he did not intend his having the whole, in such a Yoll. 353. P Wms 574. 3 id 40. 1 id 550. n. 1.

Again, a bequest or direction that the whole personal property shall go according to Law, will exclude the Exr. as much from taking the surplus. Yoll 353. 14 Ves 307.

A specific legacy to the Exr. will also exclude him from the residuum and even the next of kin will in this case take it as intestate property, in preference to the Exr. and if there is no next of kin the surplus will go to the Crown. 2. Ves 425. 3 Atk. 226. 1 Br. Ch. 154. 201.

All these rules hold against an Exr. even tho she were the wife of the testator. But there is an Exception to this rule when the legacy to her is of a specific chattel which was her own before marriage, she is not excluded from the residuum 7 Brow. P.C. 511. Yoll 353. 2 Amb. 130. n. 1.

On the other hand whenever the legacy to the Exr. is consistent with the intent that he should take the surplus. neither law nor

Equity can exclude him from it. As when a bequest to an Ex.r is merely an exception out of a larger & more general one, he will still take the residuum. 10 Mod. 550. n. Pre Chan. 231. 2 Eq Cas. 444.

All these rules excluding the Ex.r from the residuum on a presumed different intention are rules of Equity the presumption is a mere Equity 2 Atk 45. 3 id. 229.

The Ex.r is not debarred of the residuum where the interest bequeathed him is but for life 2 Vent 31. n. K. 10 Mod. 114. Rec. Chan. 316. Toller 354.

And in general where the Equitable presumption would be against the Ex.r parol evidence of the testator that the testd. Ex.r should have the residuum is admissable 2 Vent 135 n. 2 P Wms 158. to 60. 210. 420. 2 Ves 28. 1 Ves Jr 158.

But the parol evidence is admissable only on the distinct principle of rebutting an Equity, the law would give him the surplus. whatever legacies he may have had. The evidence is admitted to establish a rule of Law.

Where the presumption on the face of the will is, that the Ex.r shall have the surplus. parol evidence cannot be permitted to rebut the presumption. If so. the evidence would defeat the rule of Law.

Such evidence however is not admissable in favour of an Ex.r where he is called a Trustee of the assets. for this is expressly saying that he shall have only the legal title. Nor is it admissible when a legacy is given to him expressly for his trouble & care. 2 P. Wms 158. Toller 355.

Of Intestate Property.

Of Distribution, under the Statute of Distributions,

In Eng.d the Stat. of Distributions has no effect as to Real property. In the U.S. I conceive the succession to both Real & personal Property is regulated by Stat. Laws, the English Stat. is of no force here but the construction of that Stat. has afforded a rule for the construction of our Stat. here.

When one dies intestate the duty of making an inventory of his effects, collecting and managing the effects, and paying the debts, on the part of the Adm.r is precisely the same as that of an Exec.r But from this point they cease to be the same As there is no will the Adm.r is governed by different rules.

Before the Stat 22.d & 23.d Car. 2. the Adm.r enjoyed the whole surplus of the effects, after deducting the rationable portion, allotted to the Children and widow 2 P. Wms. 448, 2 Bl. R. 515, 1 Lev. 233 Yol 80 to 4. 369-70.

But this Stat directs the ordinary to distribute the surplus, after payment of debts and funeral charges according to the following rules, The provisions of the Stat. will be considered under three heads,

When the intestate leaves a wife and children, one third part of his personal property shall go to the widow, and the other two thirds are devided between the children and their representatives. No distribution is to be made until the expiration of one year, And each one receiving a distributive share is bound to give bonds with surety, to refund his share if debts should appear after the expiration of the year Yoller 370-2.

In Conn.t every demand must be presented within one year excepting such as arise after the intestate's death.

By the 5th sec. it is provided, that the Stat of distributions shall not apply to the estates of feme covert dying intestate. Hence the husband is entitled to Administration and is not bound to distribute Toller 373. 85 1 P Wms 381. vide Lac. Sit. Hus & Wife

The first class of cases contemplated by Stat of distributions are those, where one dies intestate, leaving a widow and children, In this case one third belongs to the widow and the rest to the children and their representatives to the utmost extent of lineal descendants, 1st Suppose the intestate leaves a widow & children all living, or where some of the children have died leaving no representatives. Hence one third goes to the widow and the rest to the children.

Representation obtains only where one or more entitled to distribution are nearer of kin than any other and when the others, take not in their own right but in right of those whom they represent, who stood in the same degree with the nearest of kin, Under this Stat. a posthumous child takes equally with those born in the testators life time 1 Ves 156. 2 P Wms 446. 2 Atk. 117. Toller 374. Lac 52.

2d If there should be but one claimant, as if the testator left no widow and but one child & no grandchildren, there child takes the whole. 3 P Wms 49. n. Pl Chan 41.

3d Suppose all the children of the intestate are dead having all left issue, Then the two thirds after deducting the widows third go to the grand children, per capita, and not by right of representation, i.e. they take equal shares. and if there were no widow, the whole would go to the grand children Pl Chan. 54. Toller 375. 1 Atk 517, 218. 2 Ves 213. 3 P Wms 30. 1 ib 505. 1 Eq. Ca 244.

4th Suppose all of those children children had died leaving children those great grand children would have taken as their parents would have done had they lived i.e. per capita.

5th Suppose there is a widow and some of the children living and other dead leaving representatives. Here the claimants are children and grand-children, thus D. is the propositus. having sons, A. B. & C. A dies leaving four sons. C dies leaving two children D. the father. dies leaving B. living. Here one third goes to the widow, one third of the residue goes to B. one third to the 4 children of A & one third to the 2 children of C. for the grand children take per stirpes, and not per capita, they take by representation and not in their own rights as next of kin. 2 Bl. R. 217, 1 Eq. Cas 247. 217. Re Clan 54.

In any of these cases, if any of the children except the heir at-law has received an advancement equal to the respective shares of the other children such child takes nothing

But this provision of the Stat. requiring any previous advancement to be cast into the accounts of distributions, does not divest the advancement. When he claims more than he has already received, his advancement is estimated and thrown into the account of the whole property. If he has received more than his equal share no part of it can be taken to make the shares of the other claimants equal to his own. 2 P Wms 443. 449, 2 Bl. R 190. 517. Toller 376.

But this provision applies only in cases of actual intestacy. Hence if one makes a will i.e. appoints an Exr and declares him trustee for the next of kin. those who have received advancements, will in addition take their shares Toller 376.

Any provision made for a child by way of settlement is an advancement as a marriage portion 3 P Wms 317, n. C. 2 Ves 440-4. 2 Ves 658

An advancement may consist of an estate in land or a charge on land 2 P Wms 441

A Portion given by the parent to the child during the lifes of the parties, but to take effect in possession after the Parents

death is an advancement Tollu 377. 2 P Wms 440.-1-5-9.

Re Chan. 182-4. Tollu 378. But this bringing an advancement into hotch pot, as it is called increases the assets for the benefit of the Children only, the widow takes her third without accounting the advancement.

2 Ver 638. Ann Dig. Adv. 4 An advancement may be in personal property and it is immaterial whether it be personal or Real.

3 P Wms 317. Amb. 189. 3 Atk 528. 1 Ver 16 But it is not every gift to a child that amounts to an advancement. Small sums of money, presents, &c. are not to be brot into the account.

Tollu 381 3 Bac 76. The education of a child and the expense attending it is not an advancement, and whatever property the Child may have acquired is not an advancement.

2 Blk. 207 504. Re. Chan 543. Tollu 87 to 89. 382. The 2d case is where the intestate leaves a wife but no children, nor representatives of children. In this case one moiety goes to the widow, and the rest to the next of kin of equal degree or their representatives. But representation extends only to the immediate issue of Brothers and Sisters of the intestate in collaterals, the mode of computation is that of the Civil law. I.E. computing up to the first common ancestor and the claimant and down from that ancestor to the claimant, one degree is allowed for each person, ascending & descending.

2 Blk 515. 516. Amb. 192. Tollu 382. Under the word next of kin the father is included and being in the first degree will take before Sisters and brothers. So of a Mother the Father being dead.

Atk 251. 1 P Wms 48-9. Ed. R. 684. Com R 96- But the Stat of James 2d places the mother in the same rank with brothers and sisters and their representatives with whom she takes an equal share.

The reason of this provision was, that the Mother might by marrying transfer her whole property from her own children

and the family of the intestate
A Step mother is entitled to no distributive share under the Stat of distributions for she is not of kin to the intestate 2 P Wms 216 Fol 383.
So under the Stat of Jac. if an intestate leaves a Mother who is a widow, and a wife but no issue, his Brothers and Sisters will take equally with the mother, and the immediate Sisters & Brothers issue will take as their parent would have taken 1 Atk 457-8, 2 P Wms 344, 1 Str 710, 1 Atk 455, Follen 383-5.
If there is no Brother or Sister, not any immediate issue of them the Mother is entitled as the Stat of distribution prescribes not according to Stat Jac. for she is not then within the Stat of Jac 4 Burrs E. L. 374, Follen 383.
No representation among collaterals is allowed further than the immediate issue of the Brothers & Sisters of the intestate Ca. Eq. 496, 2 Ver 233, 166, Salk 250, Ld R. 571, Com Rep. 87.
On the other hand if the testator leaves an Uncle living, who is next of kin also a deceased uncles child, the uncle will take the whole and the child nothing
The intestate leaves a cousin, who is his next of kin, and the issue of a deceased cousin, the cousin will take the whole, Salk 250, Ld Ray 571, Com R 87, 10 P Wms 25.
Suppose this intestate leaves a Brother and the grand children of a deceased brother the Brother takes the whole in, and beyond the immediate issue of Brothers & Sisters all collaterals take by proximity of blood and by representation
Suppose the intestate leaves the issue of several deceased sisters and Brothers, who are the next of kin these take per capita and not per stirpes, as next of kin and not by representation, 1 Eq Ca 249, Pe Chan 54, 10 P Wms 505, 3 Atk 50, 2 Ver 213, 1 Atk 454, Follen 384.
If the nearest of kin are a brother and a grand father, the

Brother takes the whole tho, they are of the same degree this rule is founded on the construction of Stat on the Co Laws preference of a Brother to a G. Father. But a G. Father of a P. Mother, excludes an uncle or an aunt. Salk 38. 251. Ld Ray 684. Com Rp. 96, 108-9. 2 Ves 213. 10 Mod 41. Pr Chan 527. A Paternal and Maternal P. Parent will take equally. 1 P Wms 53. Tolle 91, 385.

Throughout all these rules kindred of the half blood are equally entitled with those of the whole blood of the same degree. This is directly the reverse as to rule respecting Real property. Com Dig Adm. B. 1 Mod 209. Tolle 374. 1 Ves. 316 1 Ves 437. Car 51.

The Stat. directs that no distribution shall be made until the end of the year. But the interest in the several distributive shares, vests on the death of the intestate Hence if one of those entitled dies within a year. his representatives succeed to his share Car 51. 2 Ves 559. 3 P. Wms 49. n. D. 3 Atk 422.

The parties entitled to a distributive share must all, except in case of a widow, be of kin to the intestate. Mere relationship by marriage gives no title to a share except to the widow.

If the intestate had a son, who dies before himself leaving a widow she is entitled to a share. So if his daughter dying before him leaves a widower, is, aunt, The wife tho expressly entitled by Stat is not of course of kin she is allied to the intestate by affinity and takes as his widow Tolle 386. 14 Ves Jr. 372.

If an illegitimate person dies intestate leaving neither wife nor children his property goes to the State Com. Dig Adm A. 3 P Wms 33. 1 Mood 398. Doug 542-8. 2 Blk 505.

The personal property of an intestate, wherever it may be situated, is to be distributed according to the law of his domicile 1 Wood 385. Amb 27-5. 416. 2 Ves 35. 1 Hen Blk 684-90. 2 do 406. 4 TR. 182-92.

("Of the Assets.")

All assets are either Real or Personal, Legal or Equity.

Real assets consists of real estate in the hands of the heir at Law, by inheritance, this species is liable only for the satisfaction of debts by record and specialty debts, this holds when the heir has the legal title. At C Law. real assets were not liable for debts on simple contract 3 P Wms 401, 3 Wood 433. Yelln 409. They are called indifferently Real assets, and assets by descent.

Personal assets are personal property in the hands of the personal representative Touch 496. Yelln 409. 10.

An Estate pur autre vie, if devised is real assets, the rule is the same if it falls to the heir at Law as a special occupant. If there be no special occupant, it is personal in the hands of the representative 2 Blk 120. 258. 260.

Specialty creditors may take the realty even in the hands of the heir or devisee, tho there be personal assets, tho there be personal assets sufficient for all the debts, but the heir in such a case is entitled to a reimbursement out of the personal fund Yelln 411, 3 Wood 486, 2 Atk. 125. 3 ib 406. 3 P Wms 333.

Legal assets are those which constitute at Law a fund for payment of debts according to legal priority. i.e. assets of which the intestate had the legal title

Equitable Assets, can only be reached by a Court of Eqy. They are liable to creditors only in Chancy. and are such as the intestate had in them only an equitable interest, as an Eqy of Redemp.

Equitable assets are applied according to the rule of Equitable Justice.

2. Ves 764. 2 Atk. 294. 2 P Wms 416. 3 do 342. Tollen 412. Amb. 313.

Lands of real estate devised to be sold for the payment of debts is equitable assets, tho. if it had descended to the heir it would have been legal assets. But such a devise can only be enforced in Eq. Hence this Court will order payment Pari passu. to all creditors Heb. 265. 1 Ves 63. 2 ib 405. Pre Chan 127. Off of Ex 74-5.

And a mere power if devised is only equitable is merely equitable assets. 2 P Wms 552. Tollen 413. 414. 1 Brow Chan 137. 138. 1 Jus 113. n. 2. 2 Fonb. 398. 2 P Wms 416. Pre. Chan 408. 2 Brow Chan. 94. Contra, Roll 920. 1 Jus 236. 10 Wms 131. 1 Brow Chan 135. 138. n.

When land charged with the payment of debts descends to the heir at Law. it is Equitable assets. Tollen 415. 2 Fonb. 398. n. 2 Brow. Chan. 94. 1 ib. appendix 6, 8 Ves Jr. 26. Contra 10 Wms 430. 2 Atk. 290. 2 P Wms 416. n. 2.

It is a rule that a deceased debtors personal assets are to be first applied to his assets debts, unless the contrary appears in the devise 10 Wms 294. n. 1. 2 ib 366. 1 Ves 24. 2 Atk. 624-5. 3 ib 202. 3 P Wms 324. 1 Brow Ch. 144-5. 456-7.

The rule is the same, tho, all the real estate be devised subject to the payment of debts, this devise only makes the realty liable in the event of the deficiency of assets. 3 Atk 20. 3 P Wms 322. 2 Eq Ca 493. Tollen 418.

And even tho a debt is secured by mortgage the personal assets will be applied to it, so as to discharge the real estate mortgaged Salk 449. 10 Wms 360. 2 Atk 436. 1 Ves 251-2. Brow. Chan. 273.

The priority in the application of real assets upon failure of the personal fund is as follows.

Such real property as is expressly devised for the payment of debts is to be first applied, and if it is deficient no other can be touched.

If there is not a deficiency of such real Estate, the real estate descending to the heir must next be applied.

If there is still a deficiency real estate specifically devised but subject to a general charge of debts, must be next applied 1 P Wms 294 Toller 419-20, 2 Atk 424. 3 ib 566. 2 Bros Chan 357. 361.

The same order of priority is observed in favour of Legatees as in the case of Creditors

If after the personalty is exhausted, the legacies made payable out of the real estate, is to be applied according to the above order 3 P Wms 323. 1 ib 422. 2 ib 620. 1 ib 680. Toller 419-20.

Devastavit.

Devastavit is any waste of effects, or violation of duty, in the Ex.r for which he is personally liable Off of Ex 157. Com Dig Adm B.1. Toller 424.

An Ex.r or Adm.r may be answerable for a devastavit in various ways.

If he destroys, gives away, misapplies, (as by extravagant funeral expenses,) pays legacies, when the effects were not sufficient for the creditors, or pays inferior to the prejudice of superior claims, he is liable for a devastavit. So if he releases a debt without receiving the amount. 2 Blk. 508. Off of Ex 158. 9. Toller 424. 240.

So if he releases or compounds a debt whether he receives payment or not, he is accountable. In short he is accountable if he releases any cause of action accruing to him. Off of Ex 71. 159. Toller 424. 5. Hob 66. Cro E 43.

If he submits a claim to arbitrament he is liable for the difference between the debt claimed and that awarded. Off of Ex 71. 159-60. Toller 24-5.

If he takes an obligation in his own name for a debt due by simple contract he by this act extinguishes the former debt and is accountable for it Yelv 10. 2 Lev. 189.

If by compromising & sacrificing part of a claim he incurs a loss or if he enlarges the time appointed for the payment of debt, he loses it as by elopement of the debtor, he is accountable for the loss. 1 Ver 474. 2 Lev. 182.

If he pays an usurious debt, which he might have avoided he is accountable. I think the supposes him to have been aware that the debt was usurious Hob. 167. Noy 129. Yelle 426.

If by delaying to collect a debt he suffers the Stat of Limi. to bar the action he is himself liable 12 Mod 573.

If by unnecessary delay in the payment of debts he suffers additional charges by the accumulation of Interest he is liable So if the Assets are lost by his neglect 2 Lev 40. 2 Ver 299. Yelle 426.

If he employs an agent who in any way embezzels the money he is liable 6 Mod 93.

If he keeps money dead on his hand an unreasonable time when he might with safety have made it productive he is chargeable with Interest 2 Ver 744. 1 Br. Ch. 375. Bro 73. 453. 1 Ch. 2 Eq. 184.

If he sells the Assets at an under value he is liable for the full value. I think this rule requires the qualification "if he unnecessarily sells them" Ch of Ex 158. 6 Mod 181-2.

In case of perishable goods he is not liable for a loss occasioned by natural decay unless it happened thro' his neglect Yelle 428. 6 Mod 181.

If he lends money on real security apparently good he is not liable for its loss. he has done all that a prudent man can do. and by a former rule he is compellable to make the money productive I.e. to loan it on security 1 P. Wms 141.

If the husband of an Ex.rix commits a devastavit both are.

chargeable when the wife was Ex.ix before marriage. But if she became so during coverture the husband only is liable, in the former case she was liable for the assets before marriage and she cannot discharge herself by her own acts, 3 Brow. ch. 323. Yelv. 358, 9. 430.

If an Ex.ix marries after having committed a devastavit both herself and husband are liable during coverture but his liability ceases on her death.

But a devastavit by one of two Co-Ex.rs will not subject the other, for each is liable for his own acts. If however they have given a joint bond binding themselves for the acts of each other both are liable. But if a stranger gives such a joint bond he also would be bound. Hence no one is bound as Ex.r for the acts of his co Exec.r (cf. of Ex. 61 2, 2 Brown Chan. 74. Yelv. 430.

Remedies for an Executor.

As the Ex.r represents the testator in relation to his personal property and contracts, he may maintain such actions as the testator might have done, had he lived. If the deceased had recovered judgment, or held a bond or covenant the Ex.r may maintain an action on them, and if the covenant relates to realty, still if it was broken during the life time of the testator, the Ex.r may maintain an action on it, for the testator had a right to recover personally, and this right accrues to the Ex.r so also of simple contracts Cro. Eliz. 377. Salk. 167. Yelv. 156. 431. Cro. Jac. 55. Salk. 314. Com. Dig. Admin. B. 13 3 Y. R. 660.

By Stat. 4. Edw. 3. The Ex.r may maintain trespass for carrying away goods in the testators life time, at C. Law.

as such rights existed. This Stat is the foundation of all actions by an Ex.r for torts committed during the life time of the testator. the Stat. extends expressly to Ex.rs and constructively to Ex.rs Adm.rs Latch. 168. Com. Dig Adm. C. 13. Toller 433.

The only injury mentioned in the Stat is that of carrying away goods of the testator, but by construction it has been extended to all injuries in general done to the testators property in his life time, is act.

If a trespass has been committed on the testators leasehold as by cutting and carrying away coln. the Ex.r has an action, for the leasehold is personal property.

The Ex.r has been allowed to maintain Trover for goods converted during the life time of the testator, even where there was no carrying away, but where he had possession by permission of the testator, Co Cas. 37, Latch 168. 1 Ven 30. 3 Mod. 13

At C. Law. the Ex.r might have replevin for goods distrained in the testators life time. So he might have detinue for a specific chattel. Ejectment for an Ouster of the Testator for a term for years, for the subject matter is specifically recoverable and survives to the Ex.r Off of Ex. 65. 6. Latch 168. Toller 434.

Under the above Stat. the Ex.r may, it seems, recover damages in Ejectment for an ouster of the testator from real Estate in fee, but he cannot recover possession 3. Mod. 13. 1 Ven. 30. Toller 434.

The principle on which the Ex.r has this right of action is that in personal actions the title devolves on the Ex.r, now when an action is for damages the Ex.r has the title, hence he may recover in damages in such actions.

Under the same Stat an Ex.r may maintain an action against a Sheriff for an escape from execution in a judgt. recovered

by the testator. so he may recover against a sheriff for a false return. There is no stat. that gives a more liberal or remedial construction than that of 4th Edw. 3rd c. 7. Dig. adm. 73.13. Cro Car 297. Ld. R. 973. Salk 12. 4 Mod 104. Comb. 322.3.
Under this Stat also an Exr. may maintain a writ of Error, to reverse a judgt. against the testator Latch 187. Yoller 435.
Generally an Exr. may maintain actions for torts by which the testator in his life time sustained any pecuniary wrong. by which his personal estate has been impaired Latch. 187. Off of Exr. 71. Yoller 159. 435. 6.
But he has no right of action for an injury done to the person of the testator. for they die with the person. Com. Dig. Adm. B. 13. Latch 168. 9.
Nor can he have an action for an injury done to the testators freehold. He may have an action for an injury done to personal property. done by an injury to the freehold.
But for any act which is a dismemberment of the freehold as cutting groves or trees the heir at Law has the right of action 1 Ven 187. Off of Exr. 67. 8. Yoller 436.
But the Exr. may maintain actual injury of any kind of which the cause accrued after the testators death as if a bond or covenant to the testator is broken after his death for the violation is a wrong in the first instance to the Exr. rights Com. Dig. Plea. 2 D. 1. 3 Lev 212, Off of Exr. 82. Yoller 437. 5 Co. 31. b. Cro. Car. 225, 1 Lev. 250.
On the same ground he may maintain an action for taking away or injuring the assets after the testators death. So if he has a term for years and a trespass is committed on it. It is a wrong originally to the Exr. for at the time he is the nature of Assignee 6 Mod 92. Off of Exr. 70. Com. Dig Adm. B. 13.

So he may maintain an action for an escape after the testators death, whether the judgt from which the escape was made was recovered by the Ex.r of testators Off of Ex. 46. Ed. Rep 35. 2 T.R. 128. Toller 438.

In actions brot by the Ex.r he is not regularly liable for the costs even where the suit fails and judgt goes for the Deft. For costs are always deemed penal and the Ex.r is presumed not to be sufficiently acquainted with the ground of the testators claim to prevent his bringing an unfounded suit Ers Lac. 228. Yelo. 166. Lev 281. 1 Stra. 682. 3 Bur 1586. 3. Blk. 400. 4 T.R. 277-81.

This rule holds whenever it is necessary for the Ex.r to sue in his representative capacity as in actions for debts due to the testator or when the claim is derivative but in no other cases.

If the Ex.r brings an action as such which he might have maintained in his individual capacity his suing as Ex.r does not prevent him from paying costs. for in all such cases the cause of action accrues to himself, and he is presumed to be aware of the fact on which the claim rests. 11 Mod 256. 4 T.R. 280. Toller 440.

As if he sues for trespass in taking effects in his own possession Latch. 220. Sulk. 344. 2 Ven. 92. 7 T.R. 358.

An Ex.r may sue in his representative capacity when the property recovered would be assets. 1 T.R. 487. 4 ib. 280-1. 3 East. 104.

On the same principle if money belonging to the assets is rec.d by a stranger after the testators death, he may sue in his own individual capacity and is liable for costs.

If he takes an obligation in his own name he is liable for costs if defeated, 5 T.R. 234. 4 ib 280. 2 ib 477. Toller 440.

When he fails in an action by his own misplead[illegible] for it his fault

a default; he has obliged the deft to answer a claim which on the face of it is unfounded 6 T.R. 654. 3 Burr. 1584. Toller 440.

If a party to a personal action dies after final judg.t but before Execution sued out, his Ex.r may prosecute the case by a Sci-fa. Com Dig Execution E. Toller 442.

But if a Party dies after Execution in a personal action, there is no need by the Ex.r of obtaining for an Execution on Scifa for he has a g.d one already 6 Mod 297. Noy 73. Bro. Jan. 45-9. Ld Ray 1070.

If the Sheriff seizing such Execution does not choose to run the risk of paying it into the hands of the Ex.r he may pay the money into Court from whence the Execution issued and discharge himself from liability

As to the abatement of a writ before final judgt by the original party — vide Lee, Dic. Plea. Abatement,

When Partners have a right of action and one dies before suit brought, his Ex.r cannot join as Pl.ff with the survivor, the right of action survives to the surviving partner alone, and he is accountable to the Ex.r for the share of the proceeds

Salk 444 2 Levinz 290-1 Cartt 170. 2 T.R. 476. Toller 155-6. 163, 445

And tho this is supported by all the analogies of Law yet there are opinions against it. Com Dig. Mert. D. 2 Leo 188. 228. Watson on Part.p 300.

An Exec.r de son tort can sustain no action whatever in a representative capacity, he is treated as a representative only as incurring the liability of one 2 Blk. 507, 2 P Wms 383. Toller 366. 447.

All the rules laid down of remedies provided by the law for Ex.rs and all his liabilities in the above case apply equally to an Adm.r He can maintain actions and is exempt from costs whenever an Ex.r could be, and wherever an action could not be maintained by an Exec.r or he would be liable

-sible for costs, and Administrator could not in the one and would be responsible in the other. Com Dig Ad. B. 13, Offofts 259. Toller 447.

The same rule holds of Co. Adm.rs in bringing actions. Com Dig Abate E. 14, Com Dig Plea. 2 Ao. 10. Toller 440.

An Ex.r has a remedy in certain cases when he has no-no at Law. the Ex.r represents his testator as well in his equitable as legal rights to personal property. Com. Dig Chan. 2, 6.1. 3 F.1.

Thus the interest of a deceased partner rests in his personal representatives, tho the learned & Right to sue at Law. pertains to the surviving partner. but the Ex.r can have a Bill or bring in Eq.y. compelling him to account, Watson. 124. 294-5. 1 Ld Ray. 340. 2 Ves 24. n. 252.

And if a Pltff pending a suit in equity dies, his Ex.r may if it relates to the personality continue it by a Bill of revivor. Mitford Plea. 63-4. Toller 445.

And in Equity one Cr may sue his Co. Ex.r tho. at Law it is impossible as if one is beneficiary entitled and the other has in his possession more than his proportion. Toller. 447. 457

If a Bill is filed by an Adm.r pendente of Ex. the latter when of age, may enter a supplementary bill stating his right as Exec.r and prosecute his suit, Mit. Pl. 61. Toller 458.

Remedies against an Executor.

The Ex.r is liable to the extent of assets, in his hands, for all the debts of his Testator and upon all his contracts whether made in express or implied and as Ex.r he is bound whether the testator mentioned him or not in the contract

For as the Books say, the Ex.r is subpoened in the testator's contracts, or stand in the intestate's place when the testator is bound in a personal contract his Ex.r is — Off of Ex. 117-18. Co Cas. 187. 9 Co 89. b. 10 id 77. b. Com. Dig Ac. C. 14.
But an action lies vs the Ex or admin.r of a sheriff or sec.y for his against him for a violation of his trust, as for an escape. Dyer 322. Yelv. 159.
Ex.r & Adm.r liability on personal contracts of the testator will be considered under the title of "Cont. Broken."

Liability for Testator's Torts

It is again a gen. rule, where the cause of action arises from a tort by the Testator or delicto. I.e. for a wrong of any kind and which must be declared upon in tort, the Ex.r is not liable. I.e. the Ex. is not liable. It cannot be made to sound in contract. Hence if the Testator has committed a Battery, guilty of Slander, false imprison.t trespass, dwelled a water course, suffered an escape, a lien violate the penal statute, the Ex.r is not liable. For they are remedies in tort only, and no action but one sounding in tort can be brought. Com. Dig. Ac. B. 13 Off of Ex 127-8, 3 Bla 30-2, Cont. 375.
For when it must sound as the gen. issue be "guilty" or "not guilty" the action dies with the person.
But there are other cases in which the action does survive against the Ex.r according to the form of the action. When a right of action against the testator against which he might wage his law, does survive against the Ex.r

and he cannot have the advantage of wager of law, for he is not allowed to know the cause of action. When in an action on simple contract, the Ex.r is not liable for it then the testator could wage his law. Comyn 375. Toller 401 & 461.

By the com. Law, when the testator was liable in an action on simple contract, there was no remedy on his Ex.rs but now there is a very ample remedy for recovering in assumpsit by Stat. Wills.

If the Def. then pends in force or abates in force or not, if the Def. from is guilty or not guilty the Ex.r is not liable - hence why not in Battery or Slander, &c. by his Testator

On the same principle the Ex of a common Carrier cannot be subjected in an action on the case on the customs of the realm alleging ex delicto, for this not lend suit from and abuse, yet the Def. from is Guilty or not Guilty, for such is the delicacy of the law, that it will not suffer one guilty to be called into the question after his death. Comyn 375. Toller 461. But in this case the Ex can be subjected on the express or implied or implied (qs.) contract of bailment, in an action of assp. This is a case where the Plff may waive the Tort and recover on the contract, in Auch.

There are many other cases of Tort in which the Ex may subsist in another form of action i.e. provided an action can be supported which will pend in contract. Thus if the Testator has wrongfully taken the chattels of another, as a trover, his Ex.r may be intitled on the implied contract for the use of the use of the value Comyn 375 Toller 401-2.

So if the Testator has sold another's goods and carried them away, the Ex.r may be charged with their value, in assp. but with a quantum valebat. 1 Ch. Pla 80 3 T.R. 549. Comyn 370. Toller 462. On the same principle an Ex is not liable in trover for a conversion of another's goods by his Testator, but if the Testator

had sold them and rec^d the money for them. he would be liable for money had and rec^d by his testator, for the use of the owner, I.S. in an action of Ind. assumpsit, or if the goods remained in the Ex^rs hands after the Testators death, and he returns them on demand made by the owner then will he be the Ex^r for his own conversion for then is an exclusive detainer & that is a conversion Cowp. 373-4. 1 Saund 216. a. 7 T.R. 13. 1 Ch. P. 86.

The rule of discrimination as to the Ex^rs liability for the Testators debt is this, if the testator being previous in no gain or pecuniary benefit whatever the Ex^r is not liable. But if he does the Ex^r will be liable for been an action demands pi contract can be brot against him. Cowp 376-7, Toller 462,

Hence a material difference is observable between the Ex^rs right to recover for a tort to his Ex^r and his liability for a tort done by him. for in the former he has an action if his personalty has sustained damage, in the latter, the question is, whether the fund has been increased or not. if so, he is liable.

The Ex^r is liable on the Testators Contracts tho the right of action did not accrue till after the testators death. and e converso, so that if the testators agreement is to be performed in future, and dies, the Ex^r is liable H. Com Dig N. 2. D. 2. Toller 462-3.

In all these cases the Ex^rs liability is equal to the extent of assets, only in his hands, and the Judgt when had against him is that the recd a damages be levied de bonis Testatoris if the Ex^r has to that amount; and if not to the amount of what he has, and when he has a part satisfaction of debt the costs, in the regular "de bonis propris" he is liable for the costs if he hadnot assets, for he should pay over and sue before exec

Co. Jac. 672, 4 Y.R. 359, 2 Idem Practice 441, & 941. Toller 403, 4 Y.R. 648.

An Ex.r may make himself liable de bonis propriis, both for debt & damages & costs, as when he has committed a devastavit, here judgt is, here judgt is that the debt damages & costs de bonis testatoris, be levy'd if assets is left as will satisfy the judgt if not then de bonis propriis, Ex.r

So also he may subject himself personally by pleading a false plea, which he knows to be false, and which if true would be a perpetual bar to the action, as if he plead no Ex.r & falsely pleads a release to him the testator himself and judgt is found against him, but he is not liable if he pleads a release to his Testator and Judgt is found against him, for he is presumed not to be acquainted with the whole circumstances Offy Ex. 157, Toller 463-4, Ford 198, 1 Bl. Ro. 400.

It was once held in the time of Ld. Ellenborough that an Ex.r having assets, was liable on his promise to pay a legacy, and it was once held that he might be sued in his own capacity. But these decisions are overruled if according to the order of the Ecc.l Court a legatee can never recover his legacy at Law. For the Ex.r has the legal title and the legatee an equitable trust, and further what is the ground of Lord Kenyon's opinion. It is oftentimes necessary it is often times necessary to impose terms on the legatee which must be done in Equity. 8 Y.R. 593, 3 Ch. 557, 5 in 690. Parker R. 13, 3 P.Wms 262, Toller, 32 &c.

An Ex.r cannot be held to bail for he is not personally liable, it is in fact the assets that are liable the Ex.r is regarded as the depositary Co Lit 57-9, Co Inst 950, Tol. 53.

But when he has wasted the assets and the creditor, alleges a devastavit and suppose it by his own oath, the Exr. may be held to bail, and when an Exr. and Judgt. against an Exr. as Exr. & the sheriff returns a devastavit, and the creditor brings debt, on the Judgt. and the Creditor brings debt on the Judgt. the Exr. may be held to bail, and it is warranted by the return of the Officer 1 Lev 39. Cart 204. 1 Show. 16. Comb. 206. Yelv 407.

So an Exr may be held to bail when sued on his own promise, because to pay for him he has formed a personal responsibility Yelv 407.

If a deft in a personal action dies after Judgt against him but before execution issue the Plff by scire facias may have execution against the Exr. (Com. Dig Ex. 2 H. 2 Vent 218.) Com. Dig Pl. 3. Z. 7. 6 T. R. 308 Feb 24.

But if Execution had issued before deftS death, there is no need of a scire fac. for the one already issued may be sued on the goods in the hand of the Exr. Com Dig 2 H. 2 Vent. 218. Yelv 409.

When judgt. goes as an Exr. on the ground of assets, and he is sued in future, the Judgt is to lay on the assets quando acciderint as if there is a bond due at some future period the Judgt. now does not give him the assets are received and then must be alleged by scire fac. 8 Co 134. Yelv. 470. 7 T.R. 29. 2 Ken. 606-21. & 31.-666 671. 2 Lord 226.

When rules apply to Administrators generally, whether their administration is general or limited as temporary Administrators Com Dig Adm. F. Wood a Thomas 174-5.

The Exr. is liable in Chancery on all equitable demands.

When a testator dies pending a suit in chancery respecting the personalty. The suit can be continued in the Eccl. by a Bill of revivor. Atkins 03-4. Toller 479.

Legatees and those claiming under stat. of distribution have relief in Equity and not at Law. for the Ex. Adm. is a trustee and the interest of the claimants is but equitable 1 Atk. 491. 1 P. Wms. 154, 544, 575, 1 Ver 135-4.

If an Ex. denies assets in a Court of Law, when min. then. The Pltff may have a Bill in Equity for discovery of assets, merely to enable him to prevent his suit at Law. Com. Dig Chan. 2, P. 3. 3 B. 2. Toller 480.

If he compounds a claim due from the estate he must account for the income to those entitled to the assets. and this is the case of all trustees. Then the Ex. cannot charge the whole debt, over to the estate for he shall not be allowed to speculate, to his own advantage on the property of the cestui que trust, 1 Salk 155. Toller 480.

Whenever the Ex. is subject in Equity. for a breach of the trust or neglect of duty. he is liable for costs, as he would be at Law. 1 Br Cha. R. 362. 1 Atk. 468. Toller 483. 1 Ves. Jr. 244, 11 ib 58.

Bailment

A Bailment is defined to be a delivery of goods on a contract either express or implied, that they shall be returned to the bailor or according to the purpose for which they have been bailed when the purpose for which they have been bailed have been answered Jones. 3. 48. 2 Blk. 451. 1 Ser. 268. 12 Mod. 482. Co. E. 622. 2 Com. on Cont.s 251. or 288.

Thus if A delivers goods to B to keep while A is absent this is a bailment. If cloth is delivered to a tailor to make into cloth: this is a bailment. In the latter case the law implies a contract that they shall be returned properly made

There is no title so short & simple as this on which there has been so many contradictory opinions & decisions the gen. the decisions have merely confirmed to what appears to be the true opinion. The opinion of Sir Wm Jones, & in the case of Coggs & Bernard seem to be the principal sources upon this subject

Every bailment vests a qualified property in the Bailee, for a mere limited prop. gives a special property and entitles a trespass of prop. 7. T. R. 392. Stra 505. Jones 102. Yelv. 172. 2 Selw. Nh. Pa 1156. 2 Saunt 302.

In Co Lit 89. a. 4 Co. 83. & 3 Mk. 46. you will find a remark on distinguishing from other bailees is said to have a property in the goods. There is however no more distinction it is a mere existence. From the nature of the bailment this person has a higher interest than mere bailees. He has a higher interest than a "depositary" for he holds the goods as a security for his debt

and the depositary keeps them only for the benefit of the bailor. But the depositary has a special property arising out of the prop. and this extends to all other bailees. A bailee is very seldom held where the bailee of goods may maintain trover against any one excepting the true owner who cannot prove his title to the goods. There is therefore no foundation for this distinction between the powers of any other bailee arising out of the fact of property in the one & not in the other. Doe & Sh. 112. Doe & Sh. 109. Yelv. 172.

As the contract of bailment creates an obligation on the bailee to return the thing bailed to the bailor according to his direction, it follows that the bailee cannot keep the thing bailed according to the terms of his contract to enable him to restore it according to the engagement. It is no excuse here that the thing bailed may be used after in fact it lost or destroyed in the prop. of the bailee, so that it cannot be restored at all or the chose may be in as good condition as when rec.d. It is equally clear also that the end of justice and public policy requires that the bailee at all events should be liable for the loss arising to the thing bailed the nature of the bailment and the conduct of the thing bailed is such as his own conduct which he controlled in relation the question of his liability

Hence to ascertain the degree of diligence which the law expects in every case of bailment, in the performance the use to be made under the title

I begin with the gen rule applicable to a gen acceptance
Which is: That a Bailee under a general acceptance is an principle bound to keep or on this case may be use the good with care proportionate to the nature of the bailment. Inst. 8.

In order an application of this rule it is necessary to understand the nature of what constitutes a gen acceptance and to define the different degrees of diligence & neglect. I would then by the way that this gen rule has its foundation in the obvious fact that different kinds of bailment require different degrees of care & diligence.

An acceptance is gen. when there is no express agreement as to the degree of care to be used by the bailee so that the degree is left to be settled by the law

A spec acceptance is when there such an agreement with extending or qualifying the degree of liability which the law would otherwise impose upon him. 2

Ordinary diligence is that which particular men in gen use in conducting their own affairs or in other words is that which every sensible man in common prudence uses in the management of his own concerns Inst 9.10.

The degrees of diligence under this standard are not distinguished by any absolute demarcation here what exceeds is called "more" and what falls short is "less" than ordinary diligence Inst. 10.

To every degree of care or diligence there is correspondingly degree of default or neglect. The omission of ordinary care is called "ordinary neglect, or in our law latin. Lebi Culpa"

The omission of that case which very unjustly presumes the existence of their own guilt is called "lata culpa" or "crassa negligentia" "culpa in culpa"

The omission of that care even which usually men take of their goods is called "gravis" or "levis negligentia" "gross negligence" &c. Jones 13. 30.

Gross negligence is clearly the rule in all cases equivalent to evidence of fraud in the bailee for when it exists it can in fact be imputed to no other motive than a design to deprive the bailor of the goods bailed or that their value should be diminished. Thus if A. is entrusted with a package of Bank Notes to pass for B. he exposes them by leaving them in the Street day and night, here fraud must be presumed.

To resume the a further application of the general rule to particular cases as they may affect different persons to be had to the receipt of the parties respectively, or to both equally, or to one only. This is supposed to be drawn from the contract of bailment, and on this subject the three following rules are to be observed.

I. If the bailment is for the benefit of the bailor only the law requires nothing more of the bailee than the observance of good faith, liable for gross negligence only, or more correctly speaking, only for a violation of good faith i.e. fraud of which gross negligence is generally evidence / Ross C. 247. Jones 15. 16. 21-2. 32. 51-5. 64-5. 101-2. Le Roy 915.

This rule is founded on the supposed equity of it, and perhaps no more equitable rule can be established as the bailee receives no benefit, but bears advantages. With the bailor alone all the risk can be expected from the former is that he be guilty of no fraud

ndi & Co 82. when it is holden "that" where the bailee is held to keep the thing safely at his peril, this is not law.

The bailee may in this case extend his liability beyond the general by express agreement. It is in his power if he chooses to make himself an insurer in all cases. Jones 22-3. 91-2. Cc. Le Roy 710.

II When the bailee only is benefited only by the bailment he is bound to the observance of more than ordinary care. He is liable for slight neglect Jones 15-16 22-3. 89. 90-1. This rule has the same foundation in principle as the last viz. the Equity of it. "The maxim "qui sentit commodum sentire debit onus." (Col Hunting tin here related the anecdote of construction placed upon this maxim by a certain judge in Connecticut in an action then depending in an inferior court in Boston.)

III When the bailment is of benefit to both parties the obligation hinges in equal balance. The bailee is bound to use ordinary diligence and is liable for ordinary neglect. This rule prevails when the gratuitous, where both bailor & bailee are equally benefited, where private expenses that he obtains a ordinary care only. Jones 14. 101-5.

Those three general rules are applicable whenever the agreement is general.

Of the different kinds of Bailments

Of the different kinds of bailments. They are according to the Civil Law divided in 6 kinds. 1st is called "Deposition" This is a delivery of goods to be kept by the bailee for the bailor without reward. This is sometimes called a "naked bailment" and the bailee denominated the "depositary" Le Roy 712. 713 Jones 50-1 Bull. 72

1 Pow C 247.

II Bailment of the second kind is called "commodatum" this is a gratuitous loan of goods which are unspent, to be used by the bailee for his own benefit to be returned in specie, sometimes called in the Books a "loan for use" the bailor is stiled the "lender" the bailee the "borrower" this bailment in Eng. I should call "lending & borrowing" Lat Ry 913, 915, 1 Pow Con 248, Jones 50, 89, Cap Dig 619.

This species of bailment differs from that in the law of "mutuum" the latter is indeed a loan differing gratuitously, but it is a loan for consumption and to be repaid in species of the same kind but not in the same specific species. Thus if one loans money the same to be returned in an equal sum. This is not a "commodatum". So if one lend an article of consumption or pleasure, money, corn &c this is not a "commodatum" but a "mutuum" in this case of a "mutuum" the absolute property is transferred to the borrower who in case of a loss must bear it at all events. Therefore a "mutuum" is not a bailment. Jones 89, 90, 1 Bac Ab. 241, Doct & Stu. 129.

III Bailment of the third kind is called "locatio et conductio" this is a letting of the goods to be used by the bailee for hire. The bailor is called "locator" & the bailee "conductor." this is English I should call "letting & hiring" Jones 50-119, 1 Pow 251, Buller N. P. 1 Bac 243.

Sir Wm Jones states this merely as a modification of his 5th which he calls "locatum" I think however it preferable for in the 5th class the goods are to be used in a manner for the benefit of the bailor which is not the case here

IV The fourth kind of Bailment is called "Vadium" "pignori acceptio" in English a pawn or pledge. This is a delivery of goods or a security for debt due from the bailor to the bailee. The bailee is called the "pawnee" the bailor the "pawner" Lord Ray 919. Jones 50-4. Gilb 178. Co Lit. 205.

V The fifth kind of Bailment is a delivery of goods to be carried or for some act to be done about them for the bailor by the bailee, for reward. when to be carried, it is called (it is said) locatio operis mercium vehendarum" when some other act is to be done about them it is called "locatio operis faciendi" Lord Ray 917. 918. 1 Bro. 2 Bulla 272-3 - 1 Pow. Jones 50. 144, 128.

This species of bailment includes a delivery to a common carrier or any one who receives goods in the course of a public employment. it also includes a delivery to a private carrier or other bailee. Lord Ray 917-18. Bul 72-3

VI The sixth and last kind of bailment is called "Mandatum" This is a delivery of goods on the express trust the receiver or other act is gratis the bailee in this case is called the "Mandatary" Jones 73-4. Co Lit 224 Lord Ray 918.

This is the division of bailments at Com Law nor and was the division of the Roman Law from which our ancient writers derived it I do not imply that it the division a very logical one. It might to be made so as to bring in to the same class all bailees whose rights and duties are the same. Thus we should include the methods laid down being adopted henceforth by all* writers on the subject.

* or nearly all

Of different kinds of Bailment in their order

1st Of "Depositum"

1. Of naked Bailment or "Depositum" In this case the Bailee is bound only to good faith and liable at most only for gross neglect, and not even any slight beyond or under a fraud. The reason of the rule is that the bailment is advantageous to the bailor only. Jones 32. 64-5. 101.-2. 1 Roll. R. 247. Doct & St. 129. Bacon 72. 1 Hen Blk. 158. Ld Raym 1099. 561. Ld Raym 913. 913.-15. 2 Blk. 452.

In some of the books it is said that warranty does not accrue as of nothing else would. It is true that warranty does not accrue of so much left than warranty does. The word "warranty" has often been used instead as very distinct meaning. Ld Raym 913. 1 Roll R. 297.

But a depositary is not in all cases liable for gross neglect indeed he is not generally speaking liable for neglect or even and in the abstract but for fraud only. If there is any such case gross neglect does not formerly under a fraud he is not liable or in other words if the presumption of fraud arising from gross neglect is rebutted the depositary is not liable; thus if he treats his own goods of the same a a minister fied as to Bailee & value with the same neglect with which he treats the goods entrusted to him he is not liable. For it would be thought gross neglect is evident, yet all under a fraud is rebutted. Ld Raym 214. Str 1088. 4 Burr 2300.

Thus Ld Holt says if a felon or bailee is a cutler & deliver a pheasant as leaves his doors open & their goods are stolen he is not liable. but I suppose he must have been liable

him

had his own good and expend. Lee Ray 914 15 1 Pow C 248.

When owners hirers do not hold when by a specific agent the depositary assumes a higher responsibility he may stand more binding liable to any extent. The general owner extends only to a general ownership. Jones 66. Lee Ray. 685. 911. 913. 3 Reves Hill Ry Law 235-6. 394

Add according to his Wm Jones when the deposit is in company of the bailee officers is offering to keep the goods tho the question is general, yet the bailee is bound otherwise than merely for wrongs neglect. The common is that the bailee officers prevents the owner from entrusting them to a person of approved integrity. Jones 67. No authority is cited for this & in my opinion this position is very questionable for I am by no means certain that the officers of the bailee is a common thing the bailee stand employing him alone. He makes his own selection, and if he makes a wrong selection it is his own fault & I think he should be treated just as any depositary, the position laid down by his Wm Jones I would admit were the bailee bound to employ the officers bailee.

The old decisions are contrary to the general bailee relating the liability of a depositary, Co Litt 89. a. b. 4 Co. 83 b. Southcote's case, a leading case. The trover case depend Co E 815. This case was an ac of detinue and alege a delivery of goods to the defd to be kept by him which he plead to the ac that the goods were stolen and it was adjudged in him, now the decision is this case appears to be right. 1st because the exception as it appeared when the fact of the second was a wrong & a refusal to keep safely, & 2d the plea was a bad one because it did not aver that the goods were stolen without his default or even he did not state enough to warrant

not a "primâ facie" defence. The doctrine adverted to here is thus a gen. exception allows the depositary to keep the goods as his proper & is liable if the goods are stolen. There an exception to keep, which is a defence pressing w. called & an acceptance to keep then safely is the same. and therefore he is bound unless he accepts them merely to keep them as his own goods.

2 Bos 236-241. 1 Lev 224. 1 Rolle 338. Dum 549. 550. This doctrine of Southport is expressly denied and is not law. Also the decision is erroneous. 2 Ld Raym 655. 911. n. 913-14. Jones. 59. Stra 1099. Buller 72. Com. Rc. 133-5.

Recently to some judges a distinction has also been taken when the agreement (where) is a mere nude c. i.e. between that the mere agrees to keep, founded upon a valuable consideration, and agreeing not to forward, and the distinction then taken is that the latter is not binding as a contract 1 Bac. 241. This distinction however is exploded and is not law. The mere delivery of the goods is a sufficient consideration to support the promise which is made. Doct & St. 129. 12 Mod. 487. 3 Rees Hist Eng Law. 245. 6. 394.

It has been holden that if goods are left with a depositary in a locked chest that the depositary is liable for the chest only and not for the goods. & the reason given is that the goods are not entrusted to the depositary 4 Co 83b 84. a. 1 Bac. 237. 2 Salk. 47. Cro Jac 69. a. b. This is expressly denied by Lord Holt. Lutw 944. who says that the bailee has a title power over them & to any purpose to be deemed for them as well out of

of the Chest as when in. Particularly remarkable that La Fitte & Lee Che have not taken any notice of the fact of the ignorance of the ladies of what the other contained & upon equitable principles these circumstances at least might be very material for if the contents are known it is a common case of a deposit if they are not known it would seem that the bailee ought to be exempt as to the good, unless this neglect would be proof even as to the other itself. Jones 5th 6.

I have doubted that the liability of the bailee in the case of a general acceptance amounts to "ordinary diligence" and does then a Stewart agent to hold goods does not affect the determining at all events even if extended to bailing. Therefore if the goods are lost by the act of God, or by an act of enemies, or robbery, the defendants is exempt, provided he can shew that he is guilty of no negligence or neglect which contributes to the loss. For if he should be guilty of any act or default which would be a temptation to the robbery I suppose he would be liable. This excuse of the defendants has its foundation upon the same principle as a covenant for quiet enjoyment is a clause that the lessee shall enjoy the premises without molestation or hindrance, but this covenant does not extend to the acts of every person, so in a deposit to hold safely, it does not hold when the accidents above mentioned occur. [Friday September 17th 1824. J. Huntington.]

II. Commodatum. This is a gratuitous loan of goods to be used by the borrower and to be specifically restored. Here the bailment is for the benefit of the bailee only he is bound to use more than ordinary care and is liable for slight neglect. and it is sometimes in the Bailee for the best neglect. Jones vs. Bellett 2. Blac 244. 1 Par 6 247.

Thus: If a horse is borrowed, and the bailee or his servant puts him into a stable not sicken and he is stolen, he is liable. here in this case he does not use more than ordinary care, on the other hand had the man been locked the bailee would have been accidently. 1 Bro. 250. Le Roy 916.

Indeed generally it is upon this it is a general rule that the borrower is liable in case of mere theft, unless he proves extraordinary care on his part, Jones. 92. Superior force strange accidents &c. Unless specially he is liable for theft and the onus lies upon him to shew that he had used extraordinary care.

But it is a general rule that the borrower is not liable for a loss occasioned by mere acts of force & violence as he cannot resist. Le Roy 916 1 Bro 251. Therefore generally speaking (speaking) the borrower is not liable for a loss by robbery, & this upon the principle that such is no guard against such violence Le Roy 916. Jones 61. 92. n.

Thus: if the horse of the cloth is robbed of a horse or the high road by a force which he cannot resist he is not liable.

I have stated that the borrower is from force not liable that however the borrower may be liable even for robbery for if he exposes himself to it by his own conduct he is liable the case which the law requires of this bailee should

prevent him from making other expenses, and in the encumbrance of the want of care in letting or losing the goods a bailee, if the he is robbed he is still liable. Thus if he should leave the high road and pass thro' a haunt of robbers he would be held responsible for the loss occasioned by a robbery, & especially in the night time Bac 95

And a Bailee of this class is not liable generally for any of those accidents which are called inevitable or lightning, Earthquakes, Tempests, He however may make himself liable even for losses thus occasioned, & he is then liable for losses thus occasioned when he has been guilty of a previous breach of duty in relation to the bailment. E.g. If he borrows a horse for one journey and goes another he is liable for all accidents that may happen to the horse. So too if he borrows the horse for a specified time and detains it for a longer time than he is bailee for, he is liable for inevitable accidents which may happen to the horse, thus if he was robbed without any fault or want of care than that mentioned, he would be liable. Lord Holt (upon whom the foundations of principle were the rules to pass a story in a very interesting manner he would be liable because in this case his own wrongful conduct occasioned the expense Bac 95, 6 Ld Ray 915. 1 Roll E. 249, 50. 1 Bac 244.

The rule which I have mentioned that a borrower is liable for accidents inevitable occasioned by a previous breach of duty applies to all kind of bailments. Ld Ray 917, 1 Bac 237-8. Cro Jac. 24 1 Bac 243

The bailee may be made liable for the same accidents when the loss is occasioned by his own carelessness. Thus if he places a horse bailed under a building which is in imminent danger of falling, and it does fall and the horse is killed or injured he is liable Jones 95.

III "Locatio et Conductio" which I define to be a delivery of goods to be used by the bailee for hire to be paid to the bailor Lilly 93.

When in this kind of bailment it seems exclusively beneficial the bailee is liable for no less than slight neglect. The law requiring of him only the use of ordinary diligence Jones 14, 20.

This was powerfully by Ld Holt. Lindley. 20. that this bailee is bound to use the utmost diligence, if he is liable of course for slight neglect & then the liability of a hirer is the same of that of a borrower. Powell quotes the same rule from Holt & so does Buller, Nisi P. 26. 251. Buller 72. But in the first place this position of Ld Holt is but a "dictum" & he merely in and Powell offers him no reason a distinction between the liability of a hirer and that of a borrower which cannot exist in the proportion he states. but further, Ld Holt rests his authority solely on a quotation from Bracton folio 62. B. When the writer makes use of the repetition "diligentissimus" now in the 1st place repetitions are often used when the quantity is not intended to be expressed in the relation. Thus "Conspicua culpa" is invariably rendered "slight" not "slightest fault or neglect" Jones. 31.

But further the word of Bracton all transcribed from Gaius who is the only Roman Priest or law writer which makes use of the Imperiale system Jones 121. Bac 131. 3.1 There is certainly no decision or any other authority which requires of the bailee more than ordinary diligence and principle & analogy certainly requires no more. I think then that it may safely be said "that the thing hired is to be used & kept by the bailee with ordinary care". Therefore the bailee is secured "prima facie" in robbery. If indeed the loss is occasioned by his an inexplicable want of ordinary care he doubtless would be liable Jones 126.

It is said that when a chattel is let for use the bailor is not bound to repair it Doug. 720. 1 Saund 321. 1 Bac 531.

IV. Vadium. This I define to be a delivery of goods as a security for a debt due from the bailor to the bailee. Jones 50. 104. Ld Ray 918. 1 Bac 237. Co Lit 205.

As this contract is a benefit mutually to both parties to the pawnee by securing his debt & to the pawnor by prolonging a period of credit. The pawnee is bound in principle (i.e. bound to) no more than ordinary care and is bound for no more than ordinary neglect Jones 105 & For the rule is thus fully established, "more diligence" as the expression is sometimes & the expression "ordinary care" with amounting to the same, be cited in Pawnell, 1 Pow. C 252. Selk. 523. 4 Com Dig. 258.

It was holden however in Lantz Lotts Case that the pawnee is bound only to keep the pawn (only) as his own goods

and the reason given for it is that the prisoner has a property in the house. This is no reason for every bailee has a property in the thing bailed Cowp 112. 1 Bac 240. Yelv. 172.

But if this doctrine in Coke is collect it would subject the prisoner at most only for gross negligence and not even for that as the case may be. For if he pays the article found or he pays his own goods or a sum equal paid in quantity & value he would be excused for then the presumption of fraud would be rebutted. This doctrine is contrary not only to general principle but to the weight of authority Lil Reg 117. 1 Ra Ca 252. Jones 105. 115 Brooten 99 b. Salk.

As the prisoner is found then only to be a ministerial case, he is found regularly according to the general rule of a bailee if the person is accused of robbing for a robbery occasion case is not presumed to be a sufficient general Jones. Cl. 107. 107. 111. Lilly 97. Salk 522.

But the rule is otherwise if the robbery is cried by his own fault he is then liable. Salk. 522. But it is held in Southerly case that if the house is stolen the prisoner is not liable 4 Co 83 b. Co Lit 89 a. vide also 1 Bac 257. Palmer. 551. Yelv 178. Esp. 624-5. and the reason given is that he is bound to keep them safe as his own goods being a property in them. But this doctrine is not correct for even in the case of a depositary when the loss is occasioned by theft he may be liable, a fortiori a prisoner may be liable if the house be stolen. On the other hand Sir Wm Jones holds in contradistinction that the prisoner is liable for mere slips and the reason assigned is that

the bailee cannot be considered as acting ordinarily
discreet when he neither goods to be taken by stealth
If this reason was founded on a presumption of law
irrebuttable the rule would be correct. If the law
would in all cases presume consent of ordinary care
in case of theft he then would have if this presumption
could not be rebutted. This opinion of Sir Wm Jones
to be upon principle equally as unlimited as
that of Ld Coke at is certainly an arbitrary opinion
and often times opposed to common sense & experience.
I should therefore think that in this case, it is a
question of fact in every case of theft whether ordinary
care was used or not. The general doctrine
laid down by Ld Holt seems to have it in this footing
Ld Raym 917. 1 Salk 121. Salk 522. 4 Com Dig 258. 1 Bro C 252.

A pawnee like other bailees acquires a
qualified property in the pawn. Ld Raym. 916, Jones
112. 3 Salk. 268. Holt. 528.

This property lower of the pawnee is determined
by a tender of the money due on the day and the obli-
gation is then converted into a pawnor. a tender and
refusal is for this purpose considered by the law equivalent
to payment. 1 Bac. 237. 8. Co Litt. 204. Jones. 111. Yelv. 179
Bul 72. 4 Co. 83. b. 2 T.R. 27.

It follows from the last rule that if after payment
a tender and a demand of the pawn at the day the
pawnee retains it, it is a wrong done, and in such
case is liable for any loss or injury that happens to it
in all events, even for inevitable accidents, for the moment
he becomes the wrong doer in this way he is guilty of
a breach of trust, and loses all the rights of a pawnee

Jones 112. Cowdry 525. 1 Doug. 253. 2 Burr 94

In refusing to receive the tender at the day the Bailor may maintain "trover" or bail, 1 Bac 27 8. 1 Com Dig 220. id 258. Co Lit 244. Jones 111.

And the rule of the Common law in the refusal is made by the bailee's servant therein, bought a tender is made of he is acting regularly in the business being the act of the servant is the act of the bailee in this case Salk 441. Jones 126.

But the Bailee in this case may after pleads maintain assumpsit on the goods or accepted promise the redelivery the pawn. Buller 72.

There is one rule relating to pawns which is different from any one relating to any other kinds of bailment & that is that on a refusal to redeem the pledge on bought a tender at the day is an indictable offence at Com Law. This is a rule of policy instituted on regard to the pawner or pledgeor appearance that delivery of a pawn is generally secret & by persons unacquainted a embarrassed. 4 Com 258. Salk 522 3. 3 id 309.

But said by Sir Wm Jones 111. to be laid down in Buller 72. That on tender and refusal at the day the pawnee to be (being) a pledge & become a debtor id. do not find it so laid down in Buller & this proposition cannot be true. For a depositary is only liable for gross neglect. But the pawnee in this case of refusal is liable at all events. Indeed this rule is from some cases to be a bailee for after tender & refusal he is possessed of the pawn his wrongfully.

In some cases the pawnee has a right to use the pledge & some cases not. When this right exists it is founded on the pawnee cannot otherwise freely give a presumed pawn 112. and this presumption of consent is said to exist generally in not exists as the pledge is likely to be made better or worse or not at all affected by the use. pawn 112-13.

Thus if a sword of the pawnee be made better by the use the pawnee may use it, as a bettering who was confirmed by the use in his useful habits.

2. secondly if the pawn will not be injured by the use he may use it as Jewels. comm 76. But in this case the pawnee it is said was bitten at his pleasure and he unbelieved the a dog is second in case of robbery and the reason given is that as the use is advantageous to the pawnee only and is not in the discharge of his duty as bailee 4 Co 25 b. Salk 522. 1 Bro 257. 2 Ves 113. Bulle 72 Co Lit 89. La Ray 917. The right to use in this case arises from a presumption of consent founded on indulgence

If the pawnee is at an expense in keeping the pledge he may use it, this right exists to enable the pawnee to recompense himself for the expense incurred in keeping, & it supposes that in this case the pawnee would not be liable for robbery which the good use in use, as it is said in the second case cited. And accordingly by the Roman law the pawnee had an action against the pawnor for the benefit but this is not so at Co Lit 89.

In the other hand if the finder will be worse for me and the keeping of it not expense. The finder has no right to use it 6 S. If Cattle are found the finder may use them, Dave 113. 4 Com Dig 258. Ld Ray 917. Bullen 17.

If in the last case the finder does use them 'Trover' I conclude lies in the first instance for being an intermediate user it is a conversion; but the Trover 5 Bac 257. 1 Com 221.

Goods found as stated the law of finders abroad, Ld Ray 917. and according to Powell the law implies a contract by finding, it is a daily occurrence in the case of them. 1 Dev. 252. 2 Ch. R. 219. in which an opinion is given that the finder is not bound to keep safely and that he is not liable in negligent keeping. This opinion is more general the decision in that case was rather the ac was "Trover" and the evidence of the conversion claimed was negligent keeping and the court here held the ac. could not be main & actually for Trover does not lie for mere negligence. but only for misfeasance a positive wrong. Cro Eliz. 570. Salk. 655. 143. 1 Roll. abr. 6. 5 Bac 257. 5 Bull. 2827. vide also Hobart 257. 8 Co 146.

If the finder of goods cannot recover of the owner for his trouble in keeping them, it would seem at first sight, as tho the finder ought to be liable for gross negligence only, for then according to the general rule the bailment should be for the benefit of the bailor only. If the bailee is used for the benefit of good faith

But there is a manifest difference between a depositary and finder of goods, for in the one case the bailee selects his own bailee, and he can enquire into the proceedings of the bailee & may acquit himself. but in the case of a finder, the owner does not select him. the finder takes the property without the concurrence of the bailor, this case of goods found, is not strictly a bailment, because there is no delivery in fact by the owner to the finder. It would seem then to be common sense that whether the finder can recover remuneration or not of the bailor he should use a doubtful case a not take the property at all. I think therefore the decision in Powell is correct on principle.

In this State we have a Statute which makes a provision for compensating the finder, under our law therefore he would be bound upon general principles to the use of obtaining it he would not otherwise be. for then the bailment would be equally advantageous to both parties.

A finder of goods has at Com Law no lien upon them for his trouble & his expense in keeping them and therefore he is liable in trover on a refusal to deliver them. the lien here is not tendered. 2 H. Blk. 254 2 B & P. 117 Pa. Dig. 585. Shep 651.

The case of "Salvage" is indeed different but this depends upon the maritime Law, vide Hi. "Law Merchant," 2 Hen Blk 254. La Ray 293.

Suppose however we that provision is made giving a recompense to the finder, a question arises

whether he can recover in any way. If he can the act must of course be "in act" in which the Ct must imply a specific instruction and request as well as a promise. For the owner cannot be liable in tort for the owner has been guilty of no tort. Ld Ch J. Eyre says, however, a Ct would go as far as it could go towards enforcing the payment. 2 Hen Bla 258. But I do not see that a Ct can proceed a step towards enforcing payment for the act of agt in formed either upon an express or implied promise nor an express promise is out of the question, & implied one cannot I think be raised because there is no privity of contract between the finder & the owner. The finder has indeed done a neighbourly act, but it is a voluntary courtesy. Ward. 106. Lib Dig 87. 95.

I have heard that a reward by the finder of goods to secure them was demanded & refused but the "trover" the law assumes was tendered. But the expense of a finder to restore is not of course a conversion. Thus if the finder of a mere by in the power demanding is not sufficient. he is not obliged to deliver it up. Even he to deliver it up & the true owner should afterwards appear he could sue him in trover. and I suppose when he to deliver the property upon sufficient order. yet if the person to whom the goods were delivered were not the true owner the latter might maintain trover against him as for a "trover".

2 Bals 3.2. Ex 590.

But suppose that the finder instead of delivering the goods is sued & judgt is rendered against the finder afterwards he is sued for the same article by the person claiming to be the legal owner and who in fact is the owner, & proves the ownership. Can the finder in turn can plead such judgt in bar? Our Cts have decided that in such a contest no bar and that the true owner may recover. This decision I think is opposed to the analogies of law as well as to principle. The first analogy to which I refer is that of an admr claiming to be such by producing forged letters testamentary if the debtors pay to this person voluntarily, the true admr may afterwards recover the same debt. But if the person claiming to be admr sues & a judgt is rendered against the debtor, if the true admr afterwards sues, the law will not enforce a second payment. So also in the case of an Exor a creditor or person who produces a forged will if the debtors pay voluntarily to the Exor named in this forged will they may be compelled to pay over again. But had a judgt been rendered for this Exor the true Exor if there be a legal will, or an admr if there were none, could not compel the debtor to pay again.

Or the same principle is applied in cases of bankruptcy. The debtors voluntarily pay his assignees may again recover. But if the bankrupt goes into a foreign Country and there

over the debtor and recovery the debtor will not be compelled to again pay it to the assignee.

37 R. 125. 2 Bro. R. 178 Bell 309. 682. Doug 161. Cook Bankrupt Law. 370. 2 Ves. Bell 408.

The principle to be extracted in these analogies is that when the law has once compelled one to pay the money, the misfeasance of a judge that law will not compel him to pay again, & I do not perceive why this principle with these analogous cases do not apply to the case of a finder of goods, in the case mentioned.

If the owner recovers in Trover, tender at the day and there is a refusal, the owner divests himself of his debt & may have his action to recover what is due. Suppose indeed he must first make a demand of the money tendered. He must do this to enable him to judge, & enable otherwise a tender with a "tous temps prest" will defeat him of his action, the rule must follow he is entitled to take the money tendered out of Court. 1 Bro 238. 1 Bulst 29. 31.

If specific chattels are pledged and recovery the pawnee may bring trover for the money the chattels contained, for the pledge is only a security not payment. 1 Bro 238. Co. Lit. 179. Co. Lit. 209. Cro. Eliz.

It will shew the pledge cannot be intended he may use the chattels and recover, which there was an agreement to the contrary, viz. that he should recover on the pledge only. 1 Comm 258. Ow. 99. Ep. 80. 2 Lev. 116. Co. Lit. 179.

If the money is not paid at the day, the property is absolute at law in the pawnee. The pawnor hath a right of redemption in Equity. 1 Ver 238. Ibid 106. 3 Atk 395. Co Lit 205. 2 Ver. 691. 698.

But this right of redemption in Equity is not absolute any when the goods come into the pawnees hands & have been merely affined as a pawn. For if absolutely sold a right of redemption cannot accrue, and it is so said to have been held in the K.B. 1822. vide 22 Vol Christian Observer. 176. and it is said that case that the pawnee must deliver the goods, that he receives on the sale on the principal, interest, & expences. This right to redeem in Equity arises upon the equal balance the justice, if the property is not received at the day appointed he can indeed sold for then the maxim is "once a pawn always a pawn" 2 Ver. 698. 1 Ver 238 1 Atk 154. 114.

At Law Common pawn the goods of his principal do not so that the pawnee may sell or by the principal and therefore it has been held that on a tender to the pawnee of what is due to him. Pawn lies in the pawnee Str. 1178. 5 Term R. 604. 1 Atk 362. 4 Com. 237 and it has lately been held that no tender is necessary on the principal that the pawning of the chattels is a pledge of trust and of course forfeits Term 5.

After the day of payment the pawnee may sell the pledge for at law it is absolute in him Co Lit 205.

And it has been said in some Books that the pawnee may keep the day of payment

affect the Alienee of the very trespass of defendant
under. Lil. Ent. Action 124 to a Trespass. 4
Inst. 258-9. Brown 124. 1 Saun. 358. 1 Bulst. 27. 81. 1 Roll. 239.
But the contrary is held where the Ent. occasioned
otherwise than by trespass. 244. Yelv. 178. besides a lease
is a personal right and cannot be conveyed pri-
-vately. Bettington & others against a Lessee
Contract not assignable. 5 Co. 306 7 Ent. 6. 1 Roll. 31.
Dawson
2d. The assignee assigns at pleasure the premises must
be in Assignee of Ent. for the assignee might be a
person. Now in the case of Lands mortgaged
the stand, on a different ground that tenant be
embarrassed but personal property may be, and
there are some cases which contravene the position
that a person may assign from the day of grant.
Thus it is a rule that a license cannot be forfeited
by the premises, but a person is capable of forfeiting
a C. Law Estate he can convey a Lease an equit-
-able bond can transfer that, in fact can the bond-
-ee cannot assign because he cannot forfeit, Co. Litt. 8.
12 Co. 12. Cro Car 556. Moore. 100. 2 Bro. 376-7

Again a Power cannot be taken as Ent.
nor attached to the Freehold. 1 Bro 238. 352
Ryan. 3d. Co. Brown. 124. but his personal property is
a thing that may be taken as Ent. & attached to also
in the other Hand. the Power may perhaps be
exercised in the assignee by Relation. 4th. the Mortgagee
seized of quitter first paying the debt. 1 Bro 238
Bro 29. 4 Bro 257. Yelv. 179.

There is a case 2 Ver 681. 698. which has sometimes
been supposed to contradict the doctrine that the

hamlet might appoint the day of payment to A. Owens to B. Upon the day of payment Jenny to C. & Lewis a Bible to Eden. it was agreed that A should pay all the money that C owed to B. But this supposes that the opinion that the appointee is good before payment. for the Bible was lost after the Eight was forfeited at Law. for if not. why was there any apparent obligation on them the Bible was lost after the Eight was forfeited at Law. Le mont ou Equity Ca. 583. Ben Obj 4 Gr 20. And therefore the equitable claim was pleading the payment of the appointee before forfeiture. If the tender had been made before forfeiture I think the court would have allowed. The conclusion then seems to be just and analogy that the payment cannot afterwards be before forfeiture.

Necessity is allowed to be equivalent to a power that it be delivered at the time when the money was lent or the debt accrued, otherwise it was considered such an abuse as thereby giving but money on a bond to become a stipulation. & I conclude that the delivery of a commissioner is Mon 238. that the Law is now altered. 2 Lev 50. Gilb 64 Mon 350.

It was formerly doubted whether if no day of payment was fixed under a penalty bond because the penalty which is wrong made doubts the point lies in the pleading. But it is now held that the penalty may stand redeemable at any time during his life & of course after the payment of the

provided it is said that the pledgee does not call on him to redeem longer. 1 Atk. 239. Co. Litt. 344-5. Yelv. 178-9 note. 2 Co. 79.

If therefore no time of payment is fixed the pawn must be redeemed, i.e. payment or tender must be made during the pawnee's life or at his decease it is said cannot claim a redemption at law. 1 Roll. 287. 1 Roll. 29. 4 Com. 237. Pac. Chancery 420. Yelv. 179. note contra. Authority contra. If it appears however that Equity would relieve by allowing a redemption after the pawnee's death this seems reasonable. For when a day is fixed by the parties it appears to be an Equity of redemption and by stand. Litt. must be an heir.

If a day is fixed for payment the pawnee contrary is not prejudiced by his death before the day, his Ex. may receive the money or tender, or the pawnor might have done it himself. 4 Com. 237. 1 Roll. 287. 1 Roll. 29. 1 Atk. 240. The Ex. then may or tender at the day the absolute property is vested in him an Equity of redemption.

V. Species of Bailment

Pawn. Defined to be a delivery of goods to be carried distinct other out to be done about them of the trustee in a trust. Co. Litt. 89-17. Atk. 343. Jac. 127 146. Ruler 72. 1 Atk. 240.

The receiving may be to a friend or a other private person, or to an Hostler, a public employer of a Common Carrier or Hoiseman &c, or to an inn keeper. Jac. 133-4

II. Of adhering to a private carrier or other private person. — The evidence of adhering to the enemy is a special jurisdictional element, and under a other circumstances an act which would be treason as a special crime. Lilly, 918. Foster 50. It also includes a adhering to an existing Government. Foster 29. Here as the enlistment is exceptionally voluntary, the breach is an personal bonding to renounce Crown and allegiance, in adhering, replacing Sovereignty, according to the Law authorities, Foster 22, 32, 128-9, 131-2-4, 138. 1 Roll. 4, Hale 540, Lilly 918. 1 Bro 254, 12. East 457, 1 East 21

If goods are then delivered to an enemy, from which it is evident he is acting under a security, plainly based upon, as being the force being inevitable by him. Foster 128-30-8. and the Foreign enemy appears to be a stable adventurer, an equity founded. Cr Lic 89, a Lilly 918. Fitz. 131. 4 Co. 54. a. Hale 162

The case of the ship, if the property was unknown, under the circumstances the case is second, whether he is not. Foster 138. 1 East. 121. Lilly 918. 2 Gov. 5. Hale 4.

According to Sir Wm. Jones, by whom it is copied from the civil law. That if one signed a release of debt to a villainous to which into an man the whole property is transferred the employed is only a certificate of equalen value, which the workmen engage to pay on a certain more. The smuggler may, but it exceptionally to his own use. If it proceed from by unavoidable mischance or irresistible violence he as owner of it must abide the loss. "Mr. Leader," it would be therein no doubt if the force failed on account of its peculiar fitness or any uncommon nature unknown to the other, the owner, then

agreed to be specifically delivered in the form of a cup
Lib. 89 The Lessee of W. Ross seems to be. Thus
by the terms of the contract the form of the property
is to be no alteration by fusion. That it cannot be
identified or specifically restored in equal contemplation
& therefore cannot be in consideration. If in the delivery
the delivery cannot be a bailment but merely
resembling a "mutuum" similar to manufacturing
flour into bread. Purses into coins. Now in
the present plan this is clearly an artificial view
of the case. It proceeds upon the presumption
in abeyance that the identical silver should not
be returned by the parties. But if the loss of its iden-
-tity other reasons, sufficient to induce the belief
that the Smith might make the use of the silver
of equal value? I think not. But the case is not
similar to a "mutuum" or flour. Nor is
in the latter case the same specific article is never
by the terms of the contract to be restored in any
form. Whereas in this case the same article
continues but by manufacture assumes a different
form. I suppose therefore the following rule.

If the silver thus lost whether altered in form
or not can be proved to be the silver the delivery
the loss is to be borne by the bailee unless
merely the Smith was guilty of negligence or want of due
diligence.

On the other hand if the Smith be guilty of
no negligence a case not identify the silver
then the Smith must bear the loss. The L.Ch. of
N.York have extended to discharge the Smith of his

fines into their land and equity as not being land.

19 June 44.

I cannot say that I am disposed to acquiesce in the decision of the court in Johns. upon the first point stated. It there seemed to be a case of sale instead of bailment. 1 U.S. Law Journal 174

When the bailment is for some person to do some act or work in his profession relative to the property, if the law implies a tacit contract that is, to do the work with skill, & redeliver the property. Jones 128-9. 137. 140. 1 Hen Blk. 158. 1 Saund 324. 11 Co. 54. a.

But if the act to be done is not in the bailee's line of profession a common business the law implies no engagement as to the part that the act shall be skilfully done, and in such case he cannot be sued twice for not doing this without an express agreement. 3 Blk. C. 166. Jones 139-40. 1 Hen Blk. 158.

If goods delivered to a bailee of the 5th kind are lost or destroyed while the work or act to be done remains unfinished by a degree of negligence without a case which the law requires of him it has been a question whether he is entitled to wages for what he has done. It seems there he is not entitled to his wages. 3 Burr 1572-5 For the bailee receives no benefit from his work, & the law supposes a compleat recession on the part of the bailee Ap. 86

But

But 2dly The delivery may be to a person exercising a Public employment — as "Common Carriers" "Innkeepers" &c La Roy 918. Burr 132-3

Common Carriers.

A common carrier is any person in general who makes it his business to carry the goods of other for hire and is thereby distinguished from a private individual in this. That the latter does not make it his public employment to carry goods for reward. This description includes Masters & Owners of Ships. Common Hoymen Lightermen Owners of barges. Common Porters Proprietors of Waggons. and also. Stage Coaches and Ferrymen. when paid for carrying goods & a variety of other persons. La Roy 918. 1 Bac. 345 343. Allen 93. 4 Co. 84. Jones 149-50-1. Hob. 18. 1 T.R. 27. Cro Jac 330. Roy 220. Jeremys Law of Carriers 4-7-9.

The Postmaster Gen. is not a Com. Carrier he enters into no contract and receives no hire from those who deposit letters & papers with him he merely performs his duty as a Com. Carrier. for the Office, if such a Carrier was intended, could not be executed, for no compensation is given Burr 153. Comb 754 La Roy 646 Jeremy. 14.

A Carr Land it was determined. for Masters were not officers appointed by the Land Burr 153

By Stat. 12 Car 2 Navigable Rivers were navigable in Eng.

It was formerly doubted whether any other than a carrier by land fell within the cognizance of Common Carriers. But in the 11 Geo 1 the Land Regulating Common Carriers was extended to Hoymen. Dyer 148. Yelv. 17-18. Cro Car 330. 12 Mod. 487. and to Owners of Ships in the 25 Geo 2d and now the Owners of Ships entitled to carrying goods for others are Com. Carriers. Dyer 152. 2d Roll 918. Roll 220. 1 Vent 190. 238. Abbot 208. 1 Wils 281. 282. notes. 1 Salk. 78. 18. 10 Jovis 11. Stokes 107.

The Master of a Stage Ship in the King's Revenue takes in no freight. The hulling of a private merchant he is held liable for the private loss. 2 Com on C. Law 182. 281. 6 Taunt 527.

So also an inn keeper is the common carrier of a Ship of war who takes the hulling of a private merchant on freight. He is liable Wilm 313. 4 Taunt 787.

It has been held that the owner of a Stage or hackney coach who carries hire for passengers only and for baggage is not a common carrier liable for the baggage. Gilb 282. Bull 70. Comyns 25. 1 Bac. 343 Esp. 622-4. Selwyn 10-11. But it seems very questionable a priori whether the decision as to a Stage Coach is this country as to the baggage should be supported. For it would seem that the reward paid for the passage extends to their baggage, although the carriage of the baggage is a part of the consideration of another general contract, viz the contract to pay for the conveyance of the person of the owner. & Whether his conveyance & the care of the baggage is rewarded by the latter contract

cited in 2 Ves Jr 419. Chancellor L. says that if a man travelling in a strange country and taken his portmanteau with him & tho he has his eye upon his portmanteau yet the carriage is overturned, yet he expressly that land, & loss if any happened.

Title Opinion of Lord Alvanley 4 Ch 177 — — 2 Thos 7

By the Stat 7 Geo 2d. The Owners of a Ship are liable only to the value of the Ship with her appurtenances and the freight when the loss is occasioned by the misconduct of the master & mariners without the privity or knowledge of the Owners. 1 Ch 18-78. And by the 26. Geo 3d. to the same effect only where the loss is occasioned by strangers Chitt 160. 1 Lev 309-10. 2 Ernges E 288. and by the Same Stat. the Owners are wholly exempt where the loss is occasioned by fire. In this section the master is not mentioned and it has been doubted whether his responsibility is removed by the Stat Chitt 231. and it doubtless is removed by the insertion of the word "fire" in the number bill of lading.

If a Com. Carrier having the conveyance to carry & receive his hire expressly to carry he is liable to an action, for the Law implies a promise on his part under these circumstances that he will carry safe (for carry on also and safely) Bullen 70. 2 Thomas. 327, 3 Bl R 166. Jeremy. 6. 57. Ayl 92.

This is analogous to the case of an innkeeper who is bound to receive a guest who he has no sufficient cause to refuse & a common friend is liable to his guest. Stile 181 4 Mod 168

The Bailiff in the case of a common recovery being entitled to advantages he would if there were nothing the intended the application of the ex parte the Court ordering regular only. Dyer 144. If this were other wise the rule on Lord Hatton & Ratcliffe was settled in the reign of King Charles as we see Dyer 144-5. Co Lit 89 a Rule 2. 4 Co 84 a. Moore 462 1 Lev. 115. 2 Ind. The rule now is that a common recovery is liable for a debt contracted in any way except by the act of God or the King's enemies or of the Bailiff 70. 1-4. Ld Raym. 918. 3 Burr 1593. 1 East 604. 1 Y.B. 27. Dyer 144-5-6. 1 Mod 281. 1 Salk. 301-2-17. 3 Day 346. 5 id 415. 1 Connect R. 487. 3 id. 9. 6 John 160. 19 John 46.

The true foundation of this rule is, that Pleading should require an execution to the ex parte order. There must be such a rule, as some calling to whom goods must be entitled. Very frequently fraudulent & collusive & contrived with dishonest persons that the owners are ignorant of the sale injury to common & extreme inconvenience would ensue if the Lord did not indorse a strict responsibility. See Co Litt. Co Lit 89 a. 4 Co 84 a. That the common is "be received a record" This is merely verbal, for if so it would extend to a private person who calls for him. It is true if the Common Law, in the ex parte rule, does not only for record he is not to have to the extent of the ex parte rule. 1 East 604. Ld Coke's reason is not clear at all.

A common recovery is considered in the nature of an inner in all events except the act of God King's enemies & the bailiff 1 Salk 301. 2 Ld Raym 254

14 Ric. 33. Fleming 34

By the act of God is meant accidents to be understood such an act as could not happen by the intervention of man, as lightning, &c. 17 Ric 33.
As defined by the Supreme Ct of this State under the term "act of God" are included all misfortunes and accidents arising from inevitable necessity, where human prudence could not prevent or prevent.
Cow Rep. 491.

If the goods are destroyed by fire occasioned by lightning he is excused. but it seems, that if the fire is occasioned otherwise than by lightning he is liable. I suppose therefore that all other cases of loss by fire are occasioned by the intervention of man. 1 Wms. 144. 2 Ashb. 113. Dyer 66. a. Ryle 620. 5 T.R. 1 Selw 303. 1 Campb. 254.

So also when the vessel was sailing with the Thames and being near the shore and about making a tack the wind suddenly failed and the heading wind came, whether or the shore. The finding of this kind was held to be the act of God. 6 Peters 160. & he was excused. vide also Stra 128.

So also if Servants master it necessary to throw the goods of the owner overboard. the ship is excused, the necessity of doing it is imposed by the act of God. Jones 157 Ryle 620. 1 Rolle R. 79. 2 Rolle abr 557 1 Selw 303. 1 Campb 43.

In one case where a Box of Jewels was thrown overboard the Master was held not excused, Allen 93. Jones 157, provided the Box was lost & there was no necessity of throwing it overboard.

So also the killing the horse upon a wager, not
feloniously, seem and not intentionally seem to the
Mentor has been held to be felonious Felonious within
the act of God the ofte expired it by any accidental
act of this man he could not be accused. 1 Cont. 487.
2 Com. C. 283-4

The rule of intention must be the Jurors of the
Judge but upon a Special Verdict found and
not finding felonious & not intending hence the Matter
2 Com. C. 283-4

But where the Loss was occasioned by the gaming
by sets upon the outward letters in order whereby the
goods were destroyed. the master was not accountable. 1 Vis
287. Bull. 70. Sure 147. 1 Tolo 303. 413-14 5 East 428.

So when the ship was occasioned by the servants carelessness
or an accident that was led by a large bring in the room
the to was proved that there was not any injury to the ship
and the Ct held if there had been no natural explosion
there was negligence in lad. 3 East Cas 127. 1 Tolo (303) 413-14

The acts of others do not excuse the Common Carrier
they are not responsible for them either the rule matter
are Great coast pirates a Barbarous robbers or they are
enemies enemies with the sea. But Sea pirates are
within the rule 1 East 190. 1 Ph. 18. Ev. 620. Sure 106.
Abbot 237-208.

But if a common carrier intentionally or feloniously
the property to damage leave the act of God or the King,
enemies he is not excused the 1st time is a presumption
the may have been the act of God. 1 Comm. 487. Ev. 620

Thus if a Common Hoyman put to sea in
any tempestuous weather when the loss is probable he is
felonious prima facie Ev. 128

If the bail is accepted by the one in defendant
of the trustee the common bailee is excused 1 Salk
303. Selling 239. 3 Esp 74, 1 East 604, Jeremy 55-6.

There is a page of wrong bailment in converting
from being in a state of adulteration the bailee
is excused for it is the folly of the bailor to demand
it to be carried. Bullen 69. Edwards 621

Goods is sent of the carriers by an infant
and the owner gives the carr upon him the infant
of the goods on bail — 2 Show 127, Stra 344

This is analogous to an infant when goods
are received by his guardian to keep and the infant refuses
an account of being paid, in which case he could not be held
responsible for the loss. 3 Burr 183. Doe 158.

Goods delivered upon the hire of the carriage
and the passenger delivers his goods to the driver to deliver,
the goods are left in original to answer of the carriage
and he is not liable 3 Esp. R 19

In charge the carrier needs the
one the goods must have been lost while in his
possession or under his immediate care and control
i.e. while they are in his custody as a common carrier
for it that relation of bailor or common carrier never
commenced or ceased. The duties arising out of
the obligation never ceased or ceased. 1 Salk 621. 6.
John 170. 4 T.R. 581. Jeremy 60. 1 Ld Raym 46. 3 Camp 414.

Thefts of the owner and his servant are
strangers to the charge of the goods and the loss charge
of them and they are robbers. The common carrier is not
liable as common carrier for they are not considered as in
his keeping in their character. Salk 621 Bullen 76. Show 327.
Stra 690. see observations 2 B & Ald 418 of J. Chambre

the common carrier is the case but yet could be made if the loss was occasioned by any actual default of his agents or servants, negligence, unworthiness of his vessel &c 5 East 428. 8 Mo. 531.

If however the goods are delivered to the common carrier and a passenger is requested to take care of them the common carrier has the contract of the goods. Stole 2. Co Pow 304. Hob 17.

A common carrier may limit his responsibility by making a special or a conditional contract thus "that he will not be answerable for money or other valuable articles unless he has information of the quality or nature of the thing when a note he is paid a reasonable satisfaction for the money the ship takes except on such conditions. Cap 622. 4 Burr 2298. Cowp 85. 1 Ld Raym 298. 4 East. 371. 5 East 423 507. when Ld Ellenborough said that the extent and measure of motives are accurately defined in the case 5 East 507. In 4 Com 40. "The Ch J expected the judges given by the decisions of prior Cts to have corrected & limited their extending was not already carried and that no more ought to be made.

Apart under such the second exception it has been held that a common carrier may by a special agreement avoid from price.

1 Selk 304. 1 Stark 72.

But the a common carrier may limit his liability (even the) common of the nature of the goods is such that he is not at liberty to charge that he knew that he is bound to carry for a reasonable price. Selk 115. 3 Taunt 204.

It seems that a common carrier the equivalent of the

(1) The carriers of a Box is liable for loss of a Letter
tho he discharge himself by a general custom
this action correct or plaintiff the Plaintiff gentlemen the
action for loss of a remedy. In the liability of a
common carrier does not extend when the carrier shall
have been negligent or careless, this responsibility is
stated when principle of policy Bullen 70. Ven. 148.
Stra 145. 1 Bro 345. Cas Ch 485. 2 East 128. 2 Comyn 225.

And it has been held in two cases that the carrier
has been misinformed of the contents in a letter for 20s
a second charge, then when the Box contained a ring
worth of money and the carrier was told by the owner
that it contained notes and was willing to have
held liable that contents. 1 Ven 238. 1 Com Dig 23. Bro 345
Bullen 70. 1 Selw 308. n

So when a box containing £100 in money
was sent by the owner to carrier a Box the carrier
was held liable because there was no special ac-
-cepting. The Ch J. Holt said that because of the
wilful act to the carrier they might be made
pay in damages. The jury gave £90 to the carrier
Allen 93. 3 Keble 195. Sac & Ch. 130. 2 Comyn C 25. 1 Selw 307 n.

Both of these decisions are disapproved of
by the C of K B. 4 Bro 2300 by Lord King. Stra 145. Selw
305. n. a ad. & By Jones. 148. the carrier then
or amended. Exceptions they cannot be sub-
-ported. The misrepresentation was made direct
to raise an additional premium of the fraud of
the bailor, "ex dolo malo non oritur actio".

For the purpose of making a wise argument
it is now well known that there be a perfect com-
-munication betwen the owner & carrier

Law as said by C.J. Yates. The cause of a personal communication is that each may know each other mind & thoughts if they have each other mind & any other manner that is sufficient. Selw 308 n 108 Bull 2298.

Thus an advertisement in the Public Papers may be sufficient if the jury imagine & find that the same had knowledge of the contents Bull 71. 4 Burr 2298. Esp 622. Cowp 458. 1 Wm Bl. 298. 300 n. 87. R 531.

So also a notice limiting the responsibility of the carrier given by himself and placed in a conspicuous situation in the office appointed for the execution of the goods. and written in large characters so that persons delivering goods cannot fail to see it unless guilty of gross negligence the Jury may infer that the bailor was acquainted with the notice if the goods were delivered there. 1 Selw 305. 308 n. 2 Camp 405 3 Camp 27. 4 Esp 177.

The terms of these notices in any cases some of them go in derogation of the liability of the carrier entirely unless the terms of the notice are complied with. 1 Wm Bl. 298. Others limit the responsibility to a certain sum of the conditions are not complied with. - 6 East 564.

Under the term lost in these notices, it has been held that a loss by robbery is comprehended for Dallas Ch.J. 1 Gow. 115. Selw 305. n 9. 2 Camp 262.

A notice imposed at the terminus of the going and not actual when goods arrived at intermediate places where the notices are not affixed. 1 Holt N.P. 317

So also if there is a proper notice at the office but the amount of the collier billing the goods at a distance from the office. The recipient cannot be

3 Camp. 27.

If the carrier receives from Birds he is bound by their contract and he cannot avoid forwarding of the notice in the office. The letters and that carry from the head Birds and the same advantages. For the same has a right to presume that what is concealed by his contracting contains a true statement of facts, and gives a false statement of the bill. Nor contract into which he enters 2 Camp 208.

Notwithstanding the same notice is sufficient limiting the liability for any loss when the same of the goods exceeds £5 if he has full in the case that the clerk cannot have on the notice clear from the nature & value of the property or a price of freight. It must have been adopted that the same exceeds £5. That the words in the notice "for any loss or obstruction arise & notice" cannot be contract

3 Camp. 267.

16 East 247.

In this case in East it is to be observed that such negligence & non feasance when specially on the part of the carriers servants & that are sufficient to relieve the carrier notwithstanding the notice. The decisions were expressly overruled by Lord Ellenborough & Le Blanc. But Lord Ellen's attempts attention

that unless the appearance of goods accompanying the debtor the man above £5 the debtor may avoid bankruptcy by court of bankr. 4 Burr 2440.

When debtors to the Bank request a stated letter cannot not to have been represented in the Ch. Gilly has called that when a person does execute a pay for his goods out of pocket of value than £5 in Confirmed to the conditions which under after the debtor may infer that they are of great value, from other circumstances, than £5. Yet it was not which been against his creditors. Mr. Green as a bank note for a new trial the opinion was confirmed in the Court of Chancery. In this case the value of the goods was only to be inferred. 1 Price Rep. Exch. 280. Ferrey. 551. Appendix contains the question of the case, p. 308. And it is said Ch. J. Dallas hesitated that he ought always claim the benefit of his notes notwithstanding the bank of the Commissioners 1 Gow 105.

But a Notice lending of the creditors to the debtor. For goods of a certain description above the value of £5. under pretence of buying for ready other debtors under false pretence. The creditors should be paid for in cash. When the Bankrupt purchases the value of over £5 to charge that in account for in this case payment at the time was deliberately made, but it is a fact also that if payment of the other debts is based by the creditor the protection cannot be concealed. 2 Camp. 527. 1 Selw 308. 2 Com. 262

Many questions are given and to the creditor if the debtor equally of goods neglegence

and the reason are the same as exist in the case of a bailee the goods are insured, but it held bailee then be against the goods for the use of God & his creditors. It is a breach of faith, & the agent to account for money from stand is held in law, "contra bonos mores". Pow. 66-75. 2 Atkins 18. 2 Bartland 356. 4 Burr 31. 1 Atkins 209. 2 Ves 262. 10 East 244.

Upon a the question with notice that the bailee had not the bailment when the goods credited, which upon certain conditions, & the terms are not complied with the bailee cannot recover any. 1 H. Blk 258. 2 East 134. Piggot & Dent cited by Lawrence 4 East 471. 5 East 507. 6 East 564. 3 Taunt 264. Buller 71.

But notwithstanding accept in case of fraud the bailee is liable for all he receives & if he accepts species without mentioning in what he is liable for no more than he receives, or he undertakes to answer, or common bailee he is chargeable for no more than he receives extends to or to any thing more he acts under or common bailee. Thus if he receives a Bag containing £400 & is paid for £200 only from the other bailee, he is only £200 he is liable for the bailee more only. Cowell. 485. Bac 621, Buller 70-1.

A Common bailee is liable without, in which permit to pay the bailee for the loss arising to permit to pay. & after a reasonable time demand made for the bailee. 1 Bac 1[illegible]. 1 Atkins 302. 2 Show 124. 10 Ves 262.

by Chaney. This caption is not necessary that the goods be left in transitu. For if the established custom or course of business is for the carrier to deliver to the consignee he is liable till the goods are delivered to them. For it is a power of the carriers to deliver by short proof of the custom or course of business is evidence. 1 Burr. Bl. R. Ent 623. 3 Wils. 429. 5 Mo. 38. 1 Mo. 27. This rule is in conformity to a general principle of the law, that where a common carrier has been guilty of a wrongful act to have been guilty thereon and treated it as a complete tort the entire is made with respect to not merger in order of the intention of the parties. 2 Salk 423. Doug 510. 6 Cust 202. 1 Cowp 53. 7 Johns 385-90. 3 Day 346. 3 Connect R. 313.

But where when the established custom or course of business is not to deliver the goods to the consignee but to keep the goods in the warehouse until the goods are taken away the carrier charging nothing for keeping or lodging there he is not liable as common carrier after conforming to the general custom in depositing them there he may be liable as a bailee or a different description. 4 Mo 581. 2 Pet. 271. Ent 623.

It has been held that a custom to deliver the goods by putting them on the dock giving notice to the consignee who merely had authority to convey the goods could not be proved by this dec. nor could be proven that such delivery built up by custom to be a good delivery. 1 Selw 302. 15 Johns 38. 4 Ent 178.

when it is the master and owner of the carrier to deliver the goods and receive freight for them and return it to the shipper of the goods if he is liable for it if called upon to the last received demand and no direct conversion be called. 11 John 107. Selw. 1040.

Said it seems the better opinion that a common carrier is liable of course for the goods he delivers from to the consignee, unless the usual custom is not to deliver them

1 Bos 345. Cowl 57. 2 Wilk R 917, 5 T R 396.

Upon the same principle, 39 Geo 3. 2 Com 627.

If the consignee of goods delivered to that carrier the consignee must pay the freight, the consignee must regularly be the co. with the carrier. He in this case the consignee is the bailee and the consignor out merely as his agent in making the delivery, if the consignee or bailee hands of the consignor stand to the risk. Cowl. 8 T R. 330 Ex. 536 1 Pow. C. 343. 353. 3 Com 254.

On the other hand. If the consignee with his own carrier or another person hands for goods for payment of the carriage & by agreement to take the risk of the consignee he may bring the action for the agreement makes him responsible. The bring one speech contract made with him by the carrier 5 Bos 2680. 1 T R. 659. 8 T R. 333. 1 Selw 315. n. 8.

But if an order for goods to be sent by a carrier merely no act and the order delivers the goods to a common carrier in the usual way they are at the risk of the vendee. The carrier is then such agent between the delivery is made

8 T.R. 330. 1 Atk 248 3 B & P. 584. 2 Camp. 36. 1 Selw 312.

It is now been held that a person who buys with it is to forward goods on consignment but who has no interest in the receipt of the goods or part in which it is called is not liable for loss in transportation 12 John 232. 1 Selw 302.

If by the bill of lading the merchant is to deliver the goods for the consignee and it has been held (that) at the time of shipment the consignee being no party to the goods sold that the action for loss or damage must be brought in the name of the consignee. The the consignee has paid the freight before the arrival of the ship. 3 Burr 1 Lord 277, 2 Ken 178.

In an action by third owners or common carriers all must be joined. other the are in assumpsit Cp 623. Salk. 440. 5 T.R. 651. Selw 315.

If the owners have been equally in actual being are as a relative and he is then. The majority of the owners can be taken as adventure of only by plea in abatement. 5 Burr 2611-14 2 Bth R. 947, 1 Camp 291. b. Indi Contra Salk 440. overruled.

Common Carriers are said to be liable as the Carriers on the carriers of the realm and the old law was to carry upon & Receive the carriers, in exercising 1 Lev 245. Hard 485-6. 1 Bac 343. But this is unnecessary for the carriers of the realm is the law of the realm. 1 Inst. 115. b. Hob 18. and being general is no other than a branch of the common law. Jones 130. 1 T.R. 33. 3 Mod 227.

Indeed it seems idiom to call the carriers

fact expressly the distinction between special Customs which ought to be pleaded & gen Customs

And the modern mode of declaring is merely in assumpsit not stating the liability of the Carrier by the Custom. 1 Selw 314.

The disadvantages accruing to the Plff from bringing Asst are that it lets in a plea of a tender for the amount of all the previous payments adding a Count in Trover. Selw 314. The advantages are its giving the common counts with the Spec counts if the Plff has other Causes of action to sue for they are applicable. In Florida this inconvenience is here held that the Plff may declare as formerly stating the Custom or omit it, & allege it as

and that he may consider that Carr. as a tortious wrongdoer. Selw 314-15 That this is a declaration, sounding in Tort to which he may add a count in Trover That the Deft cannot be cont'd by his plea in abatement and that if he or some one of them on pad equity & was accepted the Plff may then pay it as the Co. on pad equity. 3 East 62. 4 Term. 802. 2 Mod 319. Selw 314, & 15.

But this doctrine in 3 East 62. is opposed by two decisions in C. Pleas, 2 Ch. R. 365. 454. Selw 315 R. Chief J. stated that was a declaration in assumpsit that the defdt had received the goods to carry for freight, but had not delivered them according to his duty — and in Contract, that a plea in abatement, for non-joinder was proper & that if a recovery could not be had in all the cont. it could not be had in any

the Court, on an action to Mich. 12 Eliz. and then adjourned to the Lord Chancellor and after argument, all the judges held that the court were deceived in their judgment and the same. Cited also 12. Coke 452.

When property is stolen from a common carrier or other bailee, so as the owner loses it by his agency or an actual misfeasance, property not lost or gone, the owner may be a trespasser as in the case. 5 Bac. Abr. 282. Esp. 590. Peake 257. 8 Co. 146. Salk. 315.

But if he is guilty of a misfeasance, that is, if the carrier has the goods in his hand when he refuses to deliver them, this is evidence of a conversion. Peake 655.

So where a bailee of the carrier who receives the goods to a stay, upon the waiter Peake 48. cited 2 Mod. & A.B. 74.

A common carrier has a lien upon a right to detain the goods till the carriage is paid. Ld Ray 752. 867. 5 Bac. 269. 2 Str. 64. 1 Salk. 311-12. and the carrier became on the common when he made of receiving goods of equal lien the power of retaining for his accounts. 1 Salk. Abr. 199. 3 Ld. 81. 2 Bos. & P. 44. n. a

A lien is a right accrue to, or engagement when some thing is produced of another by way of payment for a debt or duty connected with preservation of the property. 1 Cont. 4

So it is said by Pratt that if goods are stolen and received by the thief it has been held they retain them even as the same title that he was obliged to pay for.

This rule is always extended no further than to the general right of the calling — of the particular calling, 6 East 509. 7 East 224.

But a claim in favor of a common calling for a general balance may arise from a contract to that effect between the owner of the goods & the carrier, and a general usage & long established course of trade that the carrier may retain for a general balance payable at the time of the contract or delivery. Cite 311. 2 Com C. 278. 1 Bin. 98. 1 Ch 81

Thus general liens are therefore (ayu) not favored generally claim very little — all always the lien at will, relying they are encroachments also the Common Law & is strictly C East.

And further when the usage is a general consent intending of retaining by carriers for their general balance it is not sufficient to prove that it has been the practice of the carrier and boatmen at C East 509.

So too a usage for carriers to retain for a general balance of account between them & the consignee does not affect the rights of the consignee to take the goods in transitu, Cite 312. Bott 42.

So also a carrier, who by the usage of a particular trade is to be paid for the carriage of the goods by the consignee has no right to retain goods for a general balance due by the consignee for a carriage of the same sort to the consignee. Cite

The matter of this lien has been upon a third for his wages in for his disbursements paid

or for premiums paid by him
accord for the purpose of procuring a cargo. Tyler
Brown Stand. 1 Opinions La Reports 4 Leon R. 22.

So also the mariner has no lien upon
the ship for his wages or for money expended for
the use for the ship or for debts incurred by him
for repairs done to it at the voyage. Story 97. Abbot 460.
140. Selk 33: 12 Mass 440. 1 Dallas 48. 2 Sels 1071. 9 Pick 426.

But the mariners have a lien upon
the ship for their wages. They are entitled to contract
on the credit of the ship. Abbot 459. Ibid 97. Story 14.

Innkeepers —

A claim to an innkeeper was to full and proper
under this 2d general head of the topic of bailments
a bailment of this description being a delivery of goods
to a person exercising a public employment in his profes-
sional character for some act to be done about
them or care bestowed upon them for reward.

The goods here are to innkeepers and the common law
the title "innkeeper" is proper to present here
only a few general outlines of their liability for the
goods of their guests when lost or injured. The term
of innkeepers so far as they are concerned therein

The bailment here being necessarily
advantageous it would accordingly be the general
principle be held for actions respecting May 1834,
1835-6. The policy of the State however has extended
their liability somewhat further. It does not find
any such other relports the best to the Law relating
to their common carriers are bailees

but reasonable grounds have been adduced that the policy of the law does require the same liability. They therefore have an opportunity but only upon an order to extend & continue such abatement, & till an order the court a licensee or person upon premises act as such. Jones 134-5 a b. Gilb. Ejectment 162 a n. 1.

The intention is clearly built for any loss occasioned by his accounts in any way - & is found at all events to herein honest & careful accounts Jones 134-5, Ep. 626, & Co 32-3, Buller 73, 1 Bl. 430.

So also if the good g. goes on the land by a stranger the last recovery is the general bailee. Then the own case proceed on public policy requires more strict reasonably date Jones 134, Ch Jones 224. & Co 33. a, Ew. Jones 189

And he is liable in the last case whether he has been negligent or not. 5 W. & S. 276, per & Co 33. a

But is cited 1 Com Dig 211, 229, & also in Ep. 626, & is held that an interest is not necessary, then is a defense in fact or his accounts, this failure in the case cited is 5 W. & S. 276. is clearly & Buller J. Then he may be in no more than the great from negligence and this rule of Buller J. is unquestionably the correct rule

In the other hand when the good is voluntarily the account in the conversion of the general or gave it to bailee with his by his consent the interest is not liable 1 Com Dig 211 & Co 33. a Bacon

and I suppose that upon the same principles of policy the interest would be held in the case of a common robbery & Co 32 a. Jones 135 a. b. Ford 9. 3 Burr 182.

He is liable however to interest for such goods known or are "prima facie" this term includes robbers & officers & Co 32 b. Ch. 626-7.

Thus when the great had a private room in the Tower of London for the reception & exhibiting his goods for sale the same of which was guaranteed by the lord who told the great that there was a key and told him to be careful & lost the room, the Inventory was lost, held not liable. La Blanchard in giving his opinion says this was not "upon hospitium" he says an Inventory is not bound to find them for his guests. 4 Mod. 306

If the goods are carried out of the Inn by the guests accident the Inkeeper is not liable unless they are lost by his actual default. E.g. the guest orders his horse to be cast in pasture & he is stolen, the Inkeeper is excused; but if the wife over the same they without the default of the same he is liable. & Co 32 a. 1 Roll 4. 1 Comm Dig 210. Bulley 2. Esp 627.

VI Mandatum. which is a delivery of goods to be carried a some thing out to be done about them by the bailee gratis Jones 50. 2 Ld. Ray. 909. Bulle 73. Dow C. 254. This is legitimate mandate, a as this by commission.

There is a distinction between what is a defence. The one lies in contract, the other in tort or fraud. Jones 73.

This contract is for the benefit of the trustee and keeps accounts both for general principle the trustee is liable under a general accounting for any loss from gross neglect, and to clearly is this general rule established by authorities. Jones 74. 1 Ves 255. 1 Atk 158. 161. 2. Ld Ray 909-19.

But when there is an express engagement to an all mutually exist and which a any other would disagree & exist & which and is lost happens by his omitting to use the trustee is liable Jones 75. 1 Ves 255. Ld Ray 909.

But such an engagement to an all mutually exist & which may be implied in certain cases Jones 74 1 Atk 161-2.

Such an engagement however is not implied unless the act to be done is in the trustee exp. a judgment or discretion. and therefore Powell J. in Coggs & Bernard intimated that the receive appropriate to early purpose was what subject the def.t 3 Bac Ab 165. 6. 1 Ld Raym 58 Jones 189-40. 11 Co 54 a. 1 Lord 324. Ex 601

Jones however makes a distinction between the duty of a trustee where it has is a reward & when acting merely. & when in carrying out a charity act, in the former case he had the gross negligence is equal to the latter. Jones

such a case the implied engagement is to use a degree of diligence adequate to the performance of the undertaking. Thus 73-4. This seems to be consonant to the argument in 1 Pet. Admy 58. and as it tends to simplify also, for it would extend the liability of a mandatary beyond that of a private bailee of the first class.

When there is no express engagement implying a higher or more stringent duty than the bailee takes of his own goods the bailee is liable for gross negligence only. Thus 74. 1 Bow 255. Thus, if Mitchell engages Gentis to carter B's goods with his own at the same time but he enters them with his own under a wrong denomination & they are seized he is not liable. 1 Ch. B. 154. But it would be otherwise if a bailee would engage to make a general audit for him the undertaking includes there all necessary care & skill is something should be used.

The engagement thus implied by law, i.e. when the act to be done is in the bailee's own occupation, extends only to the performance of the act stipulated. It does not provide against foreign causes, i.e. causes not connected with the performance of the act. Thus in the case of the bailee who is to receive the general audit the implied engagement to use due care, skill & diligence does not exempt him for loss from robbery, or from any other accidental or unavoidable cause. & the bailee is accordingly liable for such negligence only

Yet it seems from the language of some of the Books that where any degree of engagement of other a chain is expressly or impliedly agreed, an omission is good reason, yet the authorities seem clear that the engagement stands as a contract, but not a lien. But the lien is held on for a time

La Roy 209-10-8-20. 5 Co. 145.

But merely to his Mr. Prest there seems common law been waived by the parties and leaving the goods merely to account. as his debtor. Tho this, seems is exceptionable. it, today merely to this opinion, that if the due damage is determined it can then be supposed for a mere nonfeasance. But can such an act be maintained under the circumstances of the contract seems executory only, that be outstanding? The case on this subject you will find in 4 Johns 84 cited & commented upon by Chancellor Kent. but that law is not made for me nor seems that there is no fund.

Further rules relative to Liens.

Bailees lien and Right to detain.

A lien, property is called upon & surrender any in the 405th Rule of Section in the 4th Pen. in a general sense, a lien is created by the express agreement by the terms of the contract, without any thing at post facto. and the person has a right to retain till the debt is paid. 4 Com Dig 258. Co. Pen 244-5. Yelv. 117 Salk 522 Ch 57.

Pa. St. 419.

Most bailees of the 5th point have a lien by a condition in land title they can hold. 1 Bos. 158. Hol. 42.

A Com. Carrier has a lien, or the Inkeeper, also has a right to retain the Trunk of his guest till he has paid the sum owing by the Man. Ent. 584. Holt 45. 5 Bos. 269. Lil. Reg. 361. 3 Burr. 1268. Holt 13. 449. Salk. 388. 2 Throck. 261.

So also he has a right to retain the Horse that left at the Inn by a stranger, till the expense of keeping is paid. 3 Bos. 155. Yelv. 67. 2 Bell 85. Poth. 128-129.

Obs. In this case where a Com. Carrier may retain goods that can detain to pay the stolen, this is found upon the principle that he is bound to take the hire.

So also the Inkeeper may retain the person of his guest till his whole bill is paid. But the horse cannot be retained for the expense of entertaining the guest. 3 Bos. 185-6. 2 Bell 85.

The lien of the Inkeeper is lost by his voluntarily letting the horse go out of his possession. The reason is that a lien cannot exist without possession, and in this case the poll is abandoned. 1 Burr. 493-4 1 East 4.

So also a Tailor or other Mechanic has a lien upon the materials which he has wrought. 1 Bos. 240. 8 Co. 147 a. Yelv. 42. Yelv. 67. Here the contract is annexed to the delivery of Tangible commodities for the tailor is not bound to execute his work.

It seems however that if the tailor is with the bailor of trustee the employer has right not to detain unless parties settle. Salk and attach he proceed to have and

with permission under of the landlord. Mar 240

An equitable lien cannot detain the cattle for his pay, for he is not obliged to receive them for the return of the commission over against what he would have a lien Ed 585 1 Bac 240. Bull 45. Cro Car 197.

When however there is a specific agreement which the maker receives he cannot detain and it has been holden in the case of a factor that a specific agreement to pay a certain return any thing been always around out the right of detainder. Further upon principle that where there is an express agreement the law does not imply one. Ed 585-6. 5 Bac 271. Yelv. 66. 2 Roll 92. But see 2 Wheaton Selw. 1071. where it is said the right of detainder is not waived by a specific agreement for the payment of a fixed sum for which is called Chase v Westmore in the K.B. Trinity term 56 Geo. 3. where it is said the case Cantrell v Colston also Hulton v Bragge. the opinion of Gibbs 2 Marsh 345-9.

So also he that takes a release the lien is thereby actually suspended. 2 J.B. 119.

If a person a bailee of the wood a third person has a right to keep the property for the time expired even of the bailee. 1 Bac 240. Yelv 172. Roll R 128. As in the case of a tree held for a year. But this is not property a lien. The the bailee has a specific property, for he has not a right to retain by way of security, he has only a duty.

How far the rights of strangers are affected by a Bailment.

If the bailee owns (or) the property of another the bailee is and must be deemed the proper owner to the extent of the bailment. A plain reason is that the bailee cannot pick holes the moment the bailor. 1 Roll 607. 1 Bac 237, 242.

But it is questionable whether this rule means any thing more than that the bailee will be justified in delivering back. For first the reason given for the rule requires nothing more. it is intended not to confer a right on the wrongful bailor but merely for the protection of the innocent bailee. But 2dly it is afterwards said down in Roll 607, that if the bailee delivers the property to the bailor before a demand made by the owner this will bar the owner &c. The rule in Roll implies that if the property is not then delivered the owner may recover.

If however the bailee is a common carrier and has received into the possession of the property the recd must deliver to the owner not to the bailor. for having gained possession in law he must deliver to him who in the law is the owner. 1 Bac 237, 1 Roll 607. This distinction to my the truth of it is a very critical point. I cannot see why the recd cannot discharge himself, seeing in the first case a the return would be an

The Rights of Bailees, Creditors & Purchasers to lay on his goods.

By the Stat. 21 Jac. 1. c. 19 every bankrupt shall be in his right the order & disposition the goods & chattels by the laws concerning the Bankrupts debts. They are liable for the Bankrupts debts. The goods sold but left in the Vendors possession, are to remain a bankrupt Cap. 566. 1 Atk. 166. 1 Ves. Jr. 82. Doug 303. 8 T.R. 82. 1 Ves. 348. 7 T.R. 228.

The Creditors of a Bankrupt bailee are allowed by the Stat to come upon the goods of his f.f. as strictly upon the ground between the bailee & bailor but Creditors of the bailee order allowed, from the profits. The profits of personal chattels being presumptive evidence of ownership should in some instances this Act cannot be calculated. Yet has been a decision of Chancery under the Stat 13 Eliz. upon an absolute sale of personal chattels and after sale left in possession

of the seller that was this state. Where the goods in only a lodger of fraud. & so held by Mr. Justice Ch. in the State v. Conn. 13. Eliz. Cont 233, 2 Atk. 587 595. 7 T.R. 78.

But as I have cannot & was defence, the profits of personal chattels under this Statute are held depending fraudulent and of necessity this cannot be calculated, 1 Atk 180 &c. 1 Ves. 365.

This statute extends not the rights of the bankrupt in the exercising assets as a Ex.r or guardian or Trust. in one of the Defts Estate property & the case is that

that the proof cannot be prevented by the parties who have the beneficial interest. 10th 187. 1 Mr. 187. 2 Mr. 618.

Notices are also known to mortgagees of wrongs or to claimant orders, when the vendee is bankrupt and assignees of the property of bankrupts or bankrupts. 559 - 10th 165. 1 Ves. 548. 2 Ves. 244. 17 Ves. 260. 1 Ves. 266.

But it is otherwise as to mortgagees of land. Proof in this case in pursuance of title that can be ascertained.

This that does not extend to the sale of goods at sea, and the consignee that immediate proof cannot be taken by the vendee. 10th 100. Rob. 549. 551. 2 Mr. 462.

The purchaser must have paid the proof of the bill of lading or invoice or the money be liable for the vendors debts. Rob. 567. 2 Mr. 485. 491.

So in many other cases the actual delivery of the goods is not necessary under special circumstances. 7 Mr. 71. 2 Ves. 255. Rob. 577.

The goods have been paid by the Bankrupt as his own goods are they must not the same cannot be left within his prop. order for disposition as the case will not be within the Act. Thus if a store of goods is left in his prop. and received & treated as his own the case is within the Act. But if a lease is let a lent to him for a purpose this case is not within the Act for here there is no

officer ordering or commanding. Cowh 288
10 H 185. Ch 567. 570. 3 Y. R. 316. 1 Ch 252.

Where a Corporation hires for a particular purpose, or for Ex. under an opportunity offered only for vending the goods to the vendee is not within the Statute Ch 567. 10 H 185.

The bankrupt must appear to be subject to the control of his creditors in the Court, & if from the nature of his business the presumption of consent is excluded, the true owner will have his property, as in the case of factors & factors' Goldsmiths, who do not commonly mix with their own goods like Bailees, 1 Lev 167. 1 Sid 134 etc.

If a party a case with the state in the first case of which it is treated there as two equals, 1 Le must be mutual. Le must with the mans cannot have the ordinary management of goods & have the appearance of ownership & credit therefore cannot hold the property in the bailee. This may be the appearance of ownership without the bailee is insolvent.

But cor. when the bailee is insolvent the Creditors understanding under the pope of the property are not to give him a false credit.

in an action the State of 21 Ohio 1
he is by the instrument with an, or were or refused
a verdict the defendant the property or he defendant
are by the terms of the bailment? 1 Bird Pet 82-86, Dig 306
Cite 553-4. in Corps. Bankruptcy Sec. 234 7 Ap. 67. 237 1 Rep. 248

Where the one other party was permitted
a second day to mention that he broke and removed
not the contract with a treaty terms - the bailee
recovered. 1 Ch. 185. 2 Atk. 144.

If a man lets a lease a house a collector
for a short period of money a painting and during
the term the house becomes a Bankrupt the con-
is not within the State

If a thing of good is let with the price
to keep necessary they cannot be in his order
disposed according to the State without violating
the terms of the bailment. Things of furniture are
orders like them very early certain particular
or Cannot 3 Atk. 44

If a good or lease by the purchaser only in the
temporary poss. for a particular convenable and
necessary purpose they are not in his order
and disposition with the creditors consent. E.g.
if they are lent when the creditor a good frequent
accommodation occasions. When the terms expired
of the vendor leaves the good unsold. They can
be conveyed to the vendor because a Bank the
goods are not in the order of disposition of the
vendor within the meaning of the State Dig 623. Ap. 567
Atk.

The principal difficulty in deciding on the other point arises where the bankrupt is or is not the legal owner when the first creditor obtained the determination of any, for then the equitable mortgagee takes credit adverse, & then the false credit gives the mortgagee the priority of the right to claim. The question was pending when the Law

Lord 1589.

In Cox Cases a contract not fulfilling with this Act a Stock of Ely the goods in which his true owner is the bankrupt may claim as against creditors who levied upon them as being the bankrupt's, so also he may recover in an action under the bankrupt's any subsequent purchaser unless the sale was in market overt. So also he may recover of any person into whose hands they may have fallen however innocently he may have obtained. For to all these persons the mortgagee. Cases cited Applies 1 Mch. 8 Ed. 3 76. 2 Ven 187 & 787. 3 Ctth 44. Salk 283. 5 Bur. 260-6 &c.

In that case goods there is an exception when the property vested in money or bank bills or bills. Exchange. Transferable by delivery, then a reputed property by the bankrupt to be bona fide received. The rule in market overt land the property. This is a law of commercial policy. The reason of property in such stands as a security of the bona fide dealers and not retain it. Such would be encouraged & there would be no safety in commercial dealings. Cup 39. 579. 580. Salk 126. 1 Bull 452. 458. 3 Bull 516. 1 Bla R. 485

If goods are bailed for hire to be used by the bailee for a certain time a question has been made whether the creditors of the bailee could take the use of them for the term of the bailee's interest. I think they cannot. The term is a personal one not transferable by the bailee, and analogous to the case of a personal annuity which could not be taken in Ex. for the payment of debt. This I doubted in a former Lecture. 2 Bur 352. Dyer 67-b. Cro Eliz 711 Ex. E. 4. 1 Bur 213. 1 Wms 210 Salk 404. 6 Mod 223. 11 Mod 7. 2 Ld Ray 795. 913-15-16.

To what actions the bailor & bailee are respectively liable & what actions they may maintain.

The general rule is that the bailee having the general property may sue in his own name, or any other action to recover the taken or injure the goods in the bailee's poss. 5 Bac 164. 260. Latch 214. 2 Bols 268. 1 Roll. 4. For in personal things, property generally arises upon it a poss. or Law or a constructive poss. or Right of present poss. in anyone is a poss in Law, and this right of poss the owner of goods has of course unless it is transferred by his own act or act of Law tho the goods may be in the hands of another. 2 Roll 569. Hob 438.

But if goods are pawned for a certain time or bailed for hire to be used by the bailee for a certain time the bailee cannot maintain trover or trespass or action for taking or injuring them during that time. Esp 383. 7 T.R. 9. 13 E. 480. 8 Johns 432.

If the bailee wrongfully maintains the act of trespass, then in such case, it must be for a right in land to recover for the original immediate injury to the chattel in fact the P[illegible] in their entries must have had the action a constructive prop at the time the injury was done.

If the bailee delivers the goods to a stranger the bailor recovers, hence trespass vs the bailee in the first instance. Quere. If the reason is that the stranger obtains the poss. lawfully. This rule however must relate to a bailee delivering for some purpose of benefit generally not involving a conversion with the bailors rights. for if it does the delivery is a breach of trust and void as to the bailor 5 Bac 164 1 Roll. 606. 1 Bac 237.

But on demand and refusal the bailee exhibiting sufficient warrant of ownership he may have trover as the stranger 1 Bac 242. Fitz 137 1 Roll. 607. La Ray 867.

So too bailees wrongfully dispossessed all bailees may maintain an action for the full value as the wrongdoer E.S. a common carrier a mere carrier. an agister. a finder of a dog. 5 Bac. 165. 262. La Ray 276. Buller 33. Ld 577. 1 Wms 31. Salk 143.

The ground of the bailees right to sue is this to be an account of his on liability to the bailor 5 Bac 164-5. 262. Fitz L. 87. 92. Co Lit 89. Hob 438. 13 Co 69

and therefore it has been doubted whether a depositary can have an action against a wrongdoer and a question arises whether he can keep up his own because he is not liable to the bailor. Under such an action would be found. 5 Bac Abr. 262 But I do not think there is any ground for this doubt in the case stated. And therefore I conceive that I thought that all bailees may maintain the action against wrongdoers. Every bailee has a special property in the thing bailed. Bac 112 7 Yk 392-8. 1 Bac 240. And this special property is sufficient to enable a recovery against a stranger. Therefore it is said that a finder has such a property against all but the rightful owner and consequently he may maintain trover. Bac 505 Ch 575-7. 1 Bac 346. 7 Yk. 396-7-8. 5 Bac 262. Lord. 264. Hence a servant may maintain an action for goods taken out of his master's shop. 4 Mod 264. Ye Lord 54

So a servant may have an action of robbery taken from his master's goods. 13 Co 69. But he is not liable to his master in case of robbery. Bac 129 130 138. 2 Hawk 380

Indeed it is a well settled principle that the property is sufficient against a wrongdoer Buller 33. Co 577. 575. 7 Yk. 396-8. Bac 505.

Thus upon the whole it appears that the plaintiff may have a verdict against the defendant for the value of the things which the defendant may have taken away the timber, and yet he is clearly not liable over to the defendant

Rule 33. In an unauthorized bankruptcy having acquired good title a bankruptcy may have from as a stranger doing 455. It seems clear then I think that the trustee holding to the trustee, and the grant of his right of action or a compromise but when his holding the foundation of the right of action. I think the decisions on this principle must be a wrong one. For by possibility he may be trustee. The decision is accountable and he may be actually liable for them. It is the his holding without such regard a bad faith yet this principle has been for the wrongdoer for no trustee is liable except to account for an interest is credit to the trustee except in case of gross or his own fault. No trustee is liable in all event. Also must it be determined before hand in any case that there is a liability under the decision would not bind the trustee unless the trustee is an act by the trustee. If that the trustee possible liability was the cause given a defendant as well as any other trustee. I think that put and then the a correct or to and that all trustees may maintain an act for the best order is a wrongdoer.

If the trustee delivers the goods to a stranger the latter may have an action against any 3rd person who violates the bailment. 5 Mun 260. 1 id 242. Bailee for hire has a special property & it is said is liable to the trustee & bailor i.e. he is accountable to them and may be actually liable for the goods but his special property is superior as to a stranger is wrongdoer

An auctioneer or broker may maintain an ac. in his own name on a contract for goods sold to the buyer, tho' the goods were known to belong to a master, he sues in his own name and he has a beneficial interest than to mt. his commission. 1 H Blk 81 2 id 591, 1 Ch. P. 5 a factor may have such an ac. and so may the master of a ship for freight. 1 H Blk 82. Buller 130. Peake Ins. 403.

When the bailee has title against to sue there can be but one action for the same wrong by one is tried a verdict bars the other. ac. for the same wrong 13 Co 69 5 Bro 165. 263. In 2 Roll 569 it is said if the wrong be to his who first commences shall oust the other. ante ac 8 Mich 82. but does not he who first commences the suit acquire the prior right of action, i.e. does not the first commencing of an ac. in it is pended without the other of his an ac of the same nature. does not a right of action attach by commencing the suit. this is analogous to the case of an assault of battery by the master or servant. he that begins first it is and shall prevent the other of his ac. 8 Bac 559. Latch 127.

If the bailee has recovered satisfaction in the wrongdoer he clearly cannot recover of the bailee for he can have but one satisfaction 5 Mac 250 Ld Ray 1217. Co Car 24. 35. 3 Lev. 124. Cro 319. Salk 11 Yelv 68. So if concord of the bailee first commences ac in the wrongdoer the bailee is discharged the bailee of which then vanishes ac in the bailee. the case is analogous to that of rescue & escape in

obligee of the bond proceeds against the executor of the surety in detinet Esp 610-12 Co Ca 109 Mutt 98.

On the other hand if the trustees were joint for the full value he makes himself liable at all events to the trustee. This must be the case if the trustee by commencing his action against the trustee of his

But the trustee may have an action for his special damages even tho' the other trustee has recovered the full value. This according to the general rule. The defendant can implead quasi an action. 3 Yk. 65.

If the trustee bringing takes the judgment for the trustee before the trustee the property is delivered the trustee may have a new action in the same as the former. but in principle I should think he could not maintain from a trustee.

Lis pendens property is the grand of his eq. but as I conceive this specific property gives the right for the full value only as strangers in the actions of trespass & trover as to them he may properly be considered as the owner but as between the trustee & trustee the thing trusted is not the trustees he has only a the property entitling him to the custody or use of it. 5 Bac 185. 266. Stra 505. (507) 575. 1 Ves 359. 361.

According however to 13 Co 69. Trespass a trover will lie and the trustee's damages shall mitigate damages. I apprehend however this is all even when the full value is sued for the O.P. has originally a prima facie right to recover of a tenant the whole. but the trustee as to the trustee has prima facie no such rights.

besides a strong objection to this case in 13 Co 69. That is an ac by the bailee vs the bailee the value of the property is no rule of damages for the actual injury sustained by the bailee, trespass or trover then which are brot for the value of the property seem not adapted to the case.

Generally the bailee can maintain no action as vs the bailor then detinue or an action on the case. as a trespass ac on the case for refusing. trover for the conversion. or assumpt. or the trover

4 Com Dig 258. Buller 72.

Co Jac 244. Co E 784.

Trespass will not generally lie for the original poss in Campbell 146. Pickering 191

But it is otherwise if the bailee destroys the goods for in such case the bailment is extinguished Co Lit 57. a 5 Co 13. 5 Com Dig 581. 2 Roll 555. 2 J.B. 465. and 3 Atk. 46.

Pl. Finnington

482

Inhibitions, &c.

in most important cases are under the head of ordinances

at Common Law may have may be partly owing the expense of an Inhkeeper. it matters not by what a matter of Law.

Then is this question that if Grants by their Grace multiplicate they become inconvenient to the public.

He who assumes the character becomes liable as an inhkeeper: qui certis communem notitiam detrahunt Co. Litt 594. Salk 374 3 Bac Ab. Inn & Inhkeeper

Public inns may from their number may become illegal & they are then regarded as nuisances and the keeper of the Last established inns is indictable at Common Law in for Public nuisances. as to their number it is submitted to the jury who have great latitude in their discretion, 4 Blk. 168. Co Lit 549. 3 Bac Inns &c

An inn by being occasionally may also become a nuisance at C. Law, as tavern meetings.

There are specific Statutes here regulating the duties of Inns. Also the Stat does not abrogate the C. Law 1 Hawk 198 n25 4 Blk 168. 3 Bac Inns, 179

By the Laws of this State and many of the other States no Inn can be established except a license is granted according to the provisions of the Statutes. This rule formerly only in the N. Eng States but now generally prevails. This license is issued generally by the County Ct by direction of Town boards

And by an Act passing on the ninth day lien is punishable by fine accumulating in pecuniary prosecution. Stat. of Ch.

The duties of innkeepers extend only to the entertainment of travellers and safekeeping of their persons and of their goods & effects. They are equally bound to keep. 9 Co 87, 3 Bac Ab Innkeepers. 1861-1

But an Innkeeper is not obliged or is expected to entertain strange neighbours. He is no more bound to do it any more than any other neighbourhood. His duty extends only to travellers. But if he expects without sufficient cause to entertain a traveller when applied among every tender. He is not only liable in an action at the suit but to an indictment. So it is considered as an injury to the public. 1 Hawk 225, 4 Bl. 168. 3 Bac 181. Inst.

But the case a duty of an innkeeper does not extend to the protection of the person of his guest. He must protect the effects of his guests. If the a traveller of an inn is beaten by a stranger the innkeeper is not liable. The traveller must be his own protector 8 Co 32. Bac. Ab. Inns.

If an Innkeeper a his servant sells to his guest unwholesome food a liquor he a his servant is liable in a action on the case. Hobb. 50. 3 Bac Inns & Innkeepers.

Miscellaneous Rules.

An inkeeper is not excused from his liability for the goods of his guest either by his own absence his sickness or even his insanity. Co. E. 622. 3 Bac. Inkeeper &c.

This would appear on the first impression as a very strict & rigid. but its strictness is founded on reasons of policy. the guest is exposed to fraud imposition & oppression & insult. the duties imposed hold in many instances if the rule existed not.

An Infant Inkeeper is not liable however such. nor is he liable in his character of an Inkeeper at all. his plenary experience prudent consideration. Roll 2. 3 Bacon. Infant Inkeeper.

But an Inkeeper is not bound under all possible circumstances to receive and entertain travellers. he is excused for taking a traveller on account of the sickness of his family. or if his house is fully occupied. or that if he is forewarned. his determination by plenty his room fully occupied. and if at least a day if the fact is already full of the traveller persists in staying & taking his chance the inkeeper is not liable for the goods if taken a rigid rule is a prolegomenon to opening ends in a con. Cullen. The true meaning of this rule is that he is not liable as inkeeper for the guests goods. If does not mean that he is in all cases (legally) excused. his an active fraud by which the goods are lost the rule in analogy be liable. Bac Abs.

If an innkeeper requests the guest to lock the apartment, when his goods are detained having given him the key, the guest refuses. It has been a question whether the innkeeper is liable or not.

I must suppose the innkeeper ought to be excused. Mod. 78. 1 St. 3 Bac. Jones & Pickersgill 153.

It seems clear however that the mere delivery of the key himself does not discharge the innkeeper when the goods are lost by the door being left open. Some is no request. The delivery of the key is but delivery the key of his apartments. 8 Co 33. a.

The innkeeper's liability exists only in favor of travellers & those who lodge at the Inn or travellers at the price charged to travellers, such as all tradesmen or travellers. His liability does not extend to the goods of his neighbors who lodged. Nor does it extend to travellers who board at the common price. For here they are not regarded as travellers he receives them not in the character of an innkeeper. The liability of the Inn does not extend to them. 8 Co. 32. b. 1 Roll. R. 3 Bac. Inns &c.

Again, he is not chargeable in the absence of the owner for the keeping of stuff he receives no profit. If a traveller leaves his baggage at an inn and goes on a journey, the innkeeper receiving nothing for the keeping is a mere gratuitous bailee only on a depositary. But the owner's absence must be sure. Thus he cannot be considered as a guest at the time his goods are stolen.

but if the owner can be considered as a guest at the time of the loss the innkeeper is chargeable the personal absence of the owner notwithstanding he will be regarded as a guest as long as he took lodgings, engaged a room apart as long as he expects to remain as a guest & the innkeeper is not discharged. 5 T.R. 273. Co. Ent. 88. Noy 126. Palk 79. 1 Roll.

But for goods after leaving of which the innkeeper does cease a prisoner. he commonly tells that the owner has left the inn & is not a guest. Co. Ent. 88. Salk. 388. Noy 126. 1 Roll. 3.

If a servant is robbed of his master's goods at the house the guests may maintain an action in his name. If robbed the servant might also maintain an action. Co. Ent. 224. Ld. Ray. 162. 5 T.R. 273.

The rules are quite the same in connection with the guests

The loss of some of the same remedy for the guests goods as any other person. but this is not all. He may either sue on action to recover the amount of the loss or he may detain the person of his guest. till the whole amount is paid, till all the expenses are paid, and the goods may be detained for no more expense or accident the person arrived alone but no more.

The reason of the law, is that in the instance is bound to receive. or be subjected to an action. he is entitled to recover & detain till the bill is paid. The law puts a remedy into his own hand Salk 388

Litt. 150 Bac. Ab. Prins &c.

And if the agent should default within leave the Purchaser may pursue & retake him, and so with the Goods of Tenants without leave Bac. Ab. Prins &c 186.

But within leave the Purchaser may not use the animal thus detain. The animal is considered as lent in the contents of the law. The law gives the remedy. This is analogous to distraining for rent by the Landlord. If he should put the law to labour he would be guilty of a trespass & a conversion. Ven 556, Mod 879. Bac. Prins &c.

James Cooke

Finis

Notes.

Page 286 and "consideration" The fact that the consideration should be stated in the agreement as well as the promise is denied by Judge Swift in his Digest 1 Vol. 237 to 246. The subject there is taken up and thoroughly discussed

Index
To
Domestic Relations.

A | B.

Index

C.

Index

D.

Index.

E.

Index.

F.

Index

G.

Index.

H.

Husb. & Wife . . Title - 11 -

Index.

I

Infants.

Index.

J

K.

Index

L.

Index.

M.

Index.

P.

Index.

O.

P.

Index.

Index.

Pr.

Indexe.

I.

Indexe.

I.

Index.

Ve.

Ve —

Index.

Wi.

GOULD'S

LECTURES

VOL. I.

F CHILDENDEN